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CRIMINAL EVIDENCE ACT
1898

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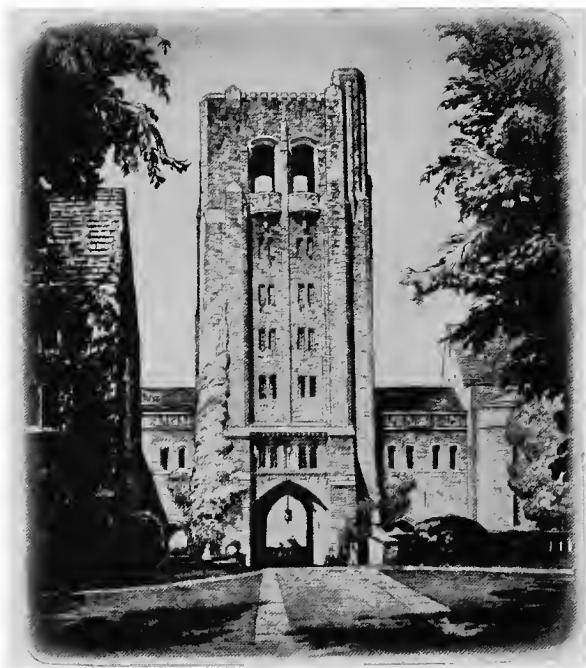
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THE
CRIMINAL EVIDENCE ACT 1898

WITH
INTRODUCTORY CHAPTER

AND
Practical Notes.

BY
ARTHUR REGINALD BUTTERWORTH
OF THE INNER TEMPLE AND WESTERN CIRCUIT, ESQUIRE, BARRISTER-AT-LAW
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LONDON:
SWEET & MAXWELL, LIMITED,
3, CHANCERY LANE,
Law Publishers.

—
1898.

LA 6635.

LONDON :

PRINTED BY C. F. HOWORTH, GREAT NEW STREET, FETTER LANE, E.C.4,

PREFACE.

THE present book is mainly intended as a handbook for those who are engaged professionally in criminal Courts, and it is hoped that it may serve as a guide to those who have not yet made a special study of the provisions of the new Act. It endeavours to point out clearly the changes effected by the Act in the conduct of criminal trials and proceedings, and to suggest the solution of doubts that have already arisen, or that may arise, as to the construction of some of its provisions.

When the Act passed, it occurred to me that as I had had considerable experience of the practical working of a somewhat similar Act passed in 1891 in New South Wales (where I held during several years the office of Crown Prosecutor, and was therefore familiar with many of the points which had arisen under that Act) I could write some notes on the English Act which might prove useful to those who had to make acquaintance with its provisions.

The present book is far larger than was originally intended, but, although the new Act is short, it makes so radical a change in the criminal procedure of this country that I felt it worth while to discuss its main provisions at some length.

Wide as may seem to be the range of the questions discussed in the notes, an endeavour has been

made to restrict them to matters immediately connected with the provisions of the Act.

I have attempted not to shirk any point of doubt or difficulty that has occurred to my mind, entertaining, as I do, a lively sense of the perplexity caused to the reader by the familiar expedient of the author who adjusts judicial differences by interposing the conjunction "but" between two irreconcilable head-notes!

Frequent references have been made throughout to the works on Criminal Evidence of Archbold and Roscoe, as I have assumed that any one wishing to make use of this book in Court will have one of those works at hand to refer to.

The appearance in the Appendix of a number of Colonial enactments is calculated, I fear, to cause a shock to the practical lawyer, which even the explanation that the author is a humble member of the Society of Comparative Legislation will not prevent. But the interest in these enactments is not purely historic. In this as in other matters legislation in the Colonies has preceded that in England, and reference to these Acts may become necessary in order to follow the decisions of the Privy Council, and even the arguments that may be raised in other Courts.

7, FIG TREE COURT,
THE TEMPLE.

October, 1898.

A. R. B.

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ABBREVIATIONS.



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THE
Criminal Evidence Act
1898.

INTRODUCTORY CHAPTER.

THE CRIMINAL EVIDENCE ACT, 1898, short and simple as its provisions appear, effects a change in procedure which goes to the root of our system of trial in criminal cases, the consequences of which must necessarily be far reaching.

The Act enables every person charged with an offence, and the wife or husband of such person, to be a competent witness for the defence at every stage of the proceedings.¹ As a general rule, none of these persons may be called as a witness except for the defence, and that only upon the application of the person charged.² In certain cases, however, the wife or husband of the person charged may be called as a witness either for the prosecution or defence and without the consent of that person.³ Those cases are:—

(1) Where the charge is for one of the offences against a woman or girl under the Criminal Law Amendment

¹ S. 1, *post*, p. 13.

² S. 1 (a), *post*, p. 13.

³ S. 4, *post*, p. 39.

Act, 1885; or for a similar offence under the Offences against the Person Act, 1861; or for an offence committed by a wife or husband against the property of the other under the Married Women's Property Act, 1882; or for cruelty or a similar offence under the Prevention of Cruelty to Children Act, 1894; or for desertion under the Vagrancy Act or the Poor Law (Scotland) Act.⁴

(2) Where the wife or husband of the person charged may be called as a witness without the consent of that person at common law, *i.e.*, mainly in cases of bodily injury inflicted by the one on the other.⁵

(3) In proceedings for a nuisance to a public highway, *etc.*, or for enforcing a civil right only—which though criminal in form are in substance civil⁶—under the Evidence Act, 1877, which is not to be affected by the present Act.⁷

The Act will also not apply to proceedings in Courts Martial, unless specially applied.⁸

The Act applies from its commencement to all criminal proceedings⁹ in England and Scotland¹⁰, but not in Ireland.¹¹

⁴ S. 4 (1), *post*, p. 39. See Schedule to Act, *post*, p. 55; and Table of Offences, *post*, pp. 58—61.

⁵ S. 4 (2), *post*, p. 39; see note ³ on p. 44.

⁶ See *per* Mellor, J., in *R. v. Stephens* (1866), L. R. 1 Q. B. 702, at 708; 35 L. J. Q. B. 251; 14 L. T. 593.

⁷ S. 6 (1), *post*, p. 50, and note ², *post*, p. 52.

⁸ S. 6 (2), *post*, p. 50, and notes ³

and ⁴, *post*, p. 53. Up to the present time (8th October, 1898), the Act has not been specially applied to Courts Martial, but the Earl of Halsbury, L.C., has stated in the House of Lords that he had no doubt it would be so applied. See Debate in the House of Lords on 1st August in *Times* of 2nd August, 1898.

⁹ S. 6 (1), *post*, p. 50.

¹⁰ See s. 5, *post*, p. 49.

¹¹ S. 7 (1), *post*, p. 54.

This Act, therefore, will bring about a complete change in almost all our criminal proceedings. Similar enactments have been in force for several years in some of the Colonies, and various points as to the working of the new law, which have been the subject of discussion there, will no doubt shortly attract attention in this country.

In New South Wales, an Act of 1891 enacts that "Every person charged with an indictable offence, and the husband or wife of the person so charged, shall be competent but not compellable to give evidence."¹² It does not attempt, like the new English Act, to limit the right of comment upon the fact of those persons abstaining from giving evidence; nor the right of cross-examination, beyond enacting that the person charged shall not be cross-examined as to previous character or antecedents without the leave of the Judge.¹³ In other Colonies, on the other hand, comment is expressly forbidden to be made either by the Judge or by counsel for the prosecution,¹⁴ while the Legislature of one Colony expressly provides that "no presumption of guilt shall be made from the fact" of an accused person, or the wife or husband of such person, "electing not to give evidence."¹⁵

These three questions—(a) whether any inference of guilt may be drawn from the abstention of the accused, or the wife or husband, from giving evidence; (b) whether

¹² N. S. W. Criminal Law and Evidence Amendment Act of 1891, s. 6, *post*, p. 96.

¹³ *Ibid.*

¹⁴ See *e.g.* the enactments in

Canada, s. 4 (2), *post*, p. 93; New Zealand, s. 400, *post*, p. 98, and s. 8, *post*, p. 100; Victoria, s. 24 (3), *post*, p. 106.

¹⁵ See South Australian Act, 1882, ss. 1, 3, *post*, pp. 102, 103.

comment on such abstention may fairly be made; and (c) whether any special restrictions should be placed on cross-examination—are the three crucial matters which arise under the new procedure. They will be found to be discussed at considerable length in the notes to this Act.

Of the two first questions, the more important (a), to which indeed the second (b) is only subservient, is as to whether any inference of guilt may be drawn from the fact that the accused, or the wife or husband of the accused, has abstained from giving evidence. One may assume that it was not intended that the present Act should in any way affect the fundamental principle of our common law, that it is incumbent on the prosecution to prove the guilt of an accused person beyond all reasonable doubt. At the same time there is grave danger that unless the working of the Act be closely watched, it may be allowed to infringe upon this wise and just principle. If the evidence for the prosecution be weak, if the prisoner be a person of unprepossessing appearance, and he fails to deny his guilt on oath, it is so easy to suggest that the prisoner's silence is tantamount to an admission, and that he has thereby supplied the original deficiencies of the evidence for the prosecution.¹⁶

¹⁶ See on this subject the observations of Mr. Justice Matthew Henry Stephen in *R. v. Kops* (1893), 14 N. S. W. Law Reports, at 198—199, 200—201, cited *post*, pp. 22—24. The following note by that learned Judge's distinguished relative, the late Sir J. F. Stephen, although wholly inapplicable, we may trust, to Englishmen, seems to have some bearing on this question:—

“During the discussions which took place on the Indian Code of Criminal Procedure in 1872, some observations were made on the reasons which occasionally lead native police officers to apply torture to prisoners. An experienced civil officer observed:—‘There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red

Where counsel for the prosecution is allowed to comment on the fact that a prisoner has not given evidence, he has in every case a double line of comment available. If the prisoner does not give evidence, the jury are invited to regard the evidence for the prosecution as virtually admitted: if the prisoner does give evidence, counsel can depreciate its effect by dwelling on the obvious temptation the prisoner is under to make out his innocence at the expense of the truth.

The new English Act expressly forbids such comment by the prosecution, but it leaves it open to be made by the presiding Magistrate or Judge. It will be said that such a matter as this of comment may safely be left to the discretion of a Judge. Upon this, however, one observation may be made. True, as it fortunately is, that such a matter may well be left to the discretion of a Judge of the High Court, who has learned by long experience to exercise a sound judgment, and to treat men on their trial with leniency and consideration, the discretion is not confined to Judges of the High Court, but is given to any Magistrate who presides at a trial by jury; and the witty saying of Bishop Blomfield is applicable to others than curates, that "when a thing is left to a man's discretion it is also left to his indiscretion."

This question of comment was very fully discussed in the judgments delivered by the Full Court of New South

pepper into a poor devil's eyes than to go about in the sun hunting up evidence.' This was a new view to me, but I have no doubt of its truth": Stephen's *General View of the Criminal Law of England*, 2nd ed., p. 188, note ².

Wales, constituted of seven Judges, in the case of *R. v. Kops* (1893),¹⁷ which came before the Privy Council on appeal in 1894.¹⁸ The judgments of the two dissentient Judges—Mr. Justice Innes and Mr. Justice Stephen, both Judges of great experience—though they cannot be cited as correctly interpreting the New South Wales enactment, clearly indicate the dangers of unrestricted comment, even from the Bench, and the pressure that has, in fact, been found to be placed by such comment upon accused persons to deny at all hazards their guilt, even where such denial involves committing perjury.

With regard to cross-examination, an attempt is made by the present Act to restrict the cross-examination of the person charged by providing that he shall not be asked “any question tending to show that he has committed, or been convicted of, or been charged with, any offence other than that wherewith he is then charged; or is of bad character,”¹⁹ unless (among other things) “the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor, or the witnesses for the prosecution.”²⁰ It appears to the writer that in the large majority of cases where the defence raised does not depend on mistaken identity or on the prisoner’s insanity, his defence will almost invariably “involve imputations on the character” of the prosecutor or of one or more of the witnesses for the prosecution, and that, unless some stringent rules for restricting such cross-examination are laid

¹⁷ 14 N. S. W. Law Reports, 150. 668.

¹⁸ *Kops v. R.*, (1894) A. C. 650;
6 R. 522; 70 L. T. 890; 58 J. P.

¹⁹ S. 1 (f.), *post*, p. 14.

²⁰ S. 1 (f.), (ii), *post*, p. 15.

down, the restriction intended by this clause will in practice prove illusory.

When the Bill was before the House of Lords on the 1st August, 1898, Lord Russell of Killowen, C. J., expressed his opinion that the limitation of cross-examination contained in the Bill was not logically defensible, and that it would be impossible to maintain any kind of artificial safeguard as to the cross-examination of an accused person.²¹ Meanwhile it is generally recognized that the House of Commons would not have passed the Bill if they had supposed that the restriction on the cross-examination of a prisoner was illusory, and that he was to be cross-examined like an ordinary witness.

Many of those who have advocated the examination of prisoners on oath appear to have overlooked the essential difference between the cross-examination of a prisoner and that of any other witness; and it is often assumed that there is no difference in principle between the two. The difference, however, between the cross-examination of a prisoner on his trial and that, say, of a defendant in a civil action appears to the present writer to be wide and im-

²¹ "Once they admitted an accused person to be accepted as a witness, it seemed to him it was impossible logically to maintain any kind of artificial safeguards as to the cross-examination of that witness, and for this reason. The object was, after all, to get at what were the total force and effect of the statement the man made, and they could not get a true appreciation of its force and effect unless he was subject to the ordinary test of cross-examination. He was, therefore, strongly of opinion that the limitation of cross-examination which the Bill proposed was not logically defensible and could not be long maintained. He admitted that the point raised a very important question, but he should be unwilling, especially at this period of the Session and at this stage, to raise any topic which might imperil the passing of a Bill which he believed would operate for good as far as it went."—Speech of Lord Russell of Killowen; see Debate in the House of Lords in *The Times*, 2nd August, 1898.

portant, arising from the essentially different nature of the issue which the jury have to try in a criminal case from that to be tried in a civil action.

According to our rules of evidence, questions put in cross-examination are divisible into two main classes. Either they must relate to facts in issue, or to facts relevant, or deemed to be relevant, thereto;²² or, secondly, they must tend to test the witness's "accuracy, veracity, or credibility; or to shake his credit by injuring his character."²³ Almost any question addressed to those matters must be permitted.²⁴ But if all questions of the second class, although they may be absolutely irrelevant to the charge preferred, are to be allowed in cross-examining a prisoner on his trial, it seems obvious that the answers to them, if unsatisfactory, cannot but seriously affect the finding of the jury as to his guilt or innocence.

Take, for instance, the familiar rule of evidence in criminal cases, that a prisoner being charged with having committed a specified offence, evidence of his bad character, or of his having committed some other offence which may seem to render it probable that he committed the offence charged, is generally inadmissible. This, according to

²² See Stephen's Digest of Evid., Art. 127, 3rd ed. 128; 4th ed. 143.

²³ Stephen's Digest of Evid., Art. 129, 3rd ed. 129; 4th ed. 144.

²⁴ For a striking illustration of the powerlessness of a Judge in a criminal case to prevent counsel insisting on a witness being compelled to answer a scandalous question wholly irrelevant to the issue

and barely relevant to the credibility of the witness, see *R. v. Orton, alias Castro* (1874), Summing-up of Cockburn, C.J., Vol. 2, 720—722; and Illustration (a) to Art. 129 in Stephen's Dig. Evid., *ubi supra*. As to the power now given to a Judge in civil cases to disallow vexatious and irrelevant questions, see R. S. C. 1883, Order 36, rule 38.

Sir J. F. Stephen, "is one of the most characteristic and distinctive parts of the English law of evidence; for this is the rule which prevents a man charged with a particular offence from having either to submit to imputations which in many cases would be fatal to him, or else to defend every action of his whole life in order to explain his conduct on the particular occasion."²⁵ It is this rule which, more than any other, constitutes the difference between evidence admissible in English trials and evidence admitted in French trials. If questions which might properly be put to a defendant in a civil action tending to test his credibility, or to shake his credit by injuring his character, were to be allowed to be put to every person charged with a criminal offence, it seems clear that this distinctive rule of our law of evidence must cease to operate; and that if the character of a witness for the prosecution—possibly an alleged accomplice—be assailed, the prisoner on going into the witness-box may be cross-examined as to every incident of his past life.

Can it be contended that the introduction before a jury of such matters of prejudice would not entirely alter the aspect of criminal proceedings in British Courts of justice, infringing as it would upon one of those main principles which lie at the root of our criminal procedure, the observance of which has proved to be one of the greatest safeguards of a fair trial?

There is another danger which those who have advocated the change in our law have appeared to minimise,

²⁵ Stephen's *Dig. Evid.*, 3rd ed. 148; 4th ed. 163.

namely, the difficult position in which it not unfrequently places the Judge. He will sometimes find himself in a dilemma, and have to elect either not himself to test the prisoner's evidence and thus endeavour to elicit the truth; or, at the serious risk of detracting from the dignified administration of justice, to enter into an altercation with the prisoner.

After some experience of the change in the law in New South Wales, the late Sir George Innes—one of the most fair-minded of men—who had presided at criminal trials for many years, said: "A Judge who, in his anxiety to discover the truth, thinking—as I fear many Judges do—that a prisoner giving evidence for himself is in the great majority of cases only adding perjury to the crime charged in the indictment, and who therefore wishes to expose the prisoner's lie, is led into asking the prisoner-witness various questions, and is soon led thereby into a departure from strict impartiality. Sir James Stephen says:²⁶ 'It would be most injurious to do anything which could diminish the absolute impartiality of the Judges; and no man who examines an unwilling witness is really quite impartial.'"²⁷

Such is believed to be the nature of some of the difficulties and dangers that beset the new procedure which this Act has introduced. It is conceived that no good purpose is to be served by ignoring them. To be forewarned is to some extent to be forearmed. Experience

²⁶ Stephen's General View of the Criminal Law of England, 1863, p. 201.

²⁷ *R. v. Kops* (1893), 14 N. S. W. Law Reports, at 195.

shows that they are real, and they cannot be lightly brushed aside. They have to be recognized and guarded against if the great reputation we have acquired for the fair and dignified conduct of our criminal trials is to be maintained. In a country like ours, where it has long been the tradition of the Bar that not only the Judge but the counsel for the prosecution should discharge his duties in a judicial spirit and with scrupulous fairness and moderation, it cannot be doubted that all existing means will be taken, and if necessary new means devised, to secure to every person charged with an offence a fair and impartial trial, in order that we may thus preserve so characteristic and admirable a feature of our criminal procedure.

CRIMINAL EVIDENCE ACT, 1898.

61 & 62 VICT. CAP. 36.

An Act to amend the Law of Evidence.

[12th August, 1898.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person.¹ Provided as follows:—

Com-
petency of
witnesses
in criminal
cases.

- (a.) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application :
- (b.) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution² :
- (c.) The wife or husband of the person charged shall not, save as in this Act

§ 1.

mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged³:

(*d.*) Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage⁴:

(*e.*) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged⁵:

(*f.*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

- (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged⁶; or
- (ii) he has personally or by his advo-

cate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution⁷; or

§ 1.

(iii) he has given evidence against any other person charged with the same offence.⁸

(g.) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the Court, give his evidence from the witness box or other place from which the other witnesses give their evidence :

(h.) Nothing in this Act shall affect the provisions of section eighteen of the Indictable Offences Act, 1848,⁹ or any right of the person charged to make a statement without being sworn.¹⁰

^{11 & 12}
Vict. c. 42.

¹ **Competency of Defendant and Defendant's wife or husband in criminal proceedings, and extent of application of Act.**—Every person charged with an offence, and the wife or husband of such person, will in future be competent witnesses for the defence at every stage of the proceedings.

On and after the 12th October, 1898 (see s. 7 (2), *post*, p. 54), the Act immediately applies to all criminal proceedings, including those pending when the Act

1 (2)

§ 1. comes into operation (see s. 7 (2), and note thereto, *post*, pp. 54-55), in England and Scotland, but not in Ireland (s. 7 (1), *post*, p. 54) other than those in Courts Martial (as to which, see s. 6 (2), *post*, p. 50), except that proceedings for the non-repair of, or for a nuisance to, a highway, bridge, &c., or for trying a civil right only, are still governed by the Evidence Act, 1877, whereby the defendant and the defendant's husband or wife are not merely competent witnesses for the defence, but can be compelled to give evidence for the prosecution: see s. 6 (1), *post*, p. 50.

Under the present Act, a person charged can in no case be called as a witness for the prosecution, and can only be called for the defence "upon his own application": s. 1 (a), *ante*, p. 13. As a general rule, the wife or husband of such person cannot be called as a witness for the *prosecution*, nor be called for the *defence* except upon the application of the person so charged: s. 1 (c), *ante*, pp. 13-14; but if the offence charged is one of the offences specified in the Schedule to the Act (*post*, p. 55), the wife or husband may be called either for the prosecution or defence, and without the consent of the person charged: s. 4 (1), *post*, p. 39.

Under various earlier Acts, the defendant alone, and under other Acts the defendant and the defendant's wife or husband were made competent witnesses; by some Acts at every stage of the charge, by others at every stage of the charge except before the grand jury: see *e.g.*, the Criminal Law Amendment Act, 1885, s. 20, and the Law of Libel Amendment Act, 1888, s. 9. By the present section they are made competent witnesses *for the defence* at every stage of the proceedings—an enactment which, it is conceived, has the effect of excluding their evidence before the grand jury, since it is the duty of the grand jury to examine merely those witnesses whose names are indorsed on the back of the indictment whose evidence is sufficient to establish a *prima facie*

case. As to the duties of the grand jury, see Stephen's Digest of Crim. Procedure, 121; Arch. 85—89; Rosc. 177-8. § 1.

Under this section every person charged with an offence is a competent witness for the defence, whether he is charged solely or jointly with any other person. Prior to this Act, the general rule of law was that if A. and B. were jointly indicted and given in charge to the jury, and were on their trial together, neither could be called as a witness *for* or *against* the other: *R. v. Payne* (1872), L. R. 1 C. C. R. 349; 41 L. J. M. C. 65; 12 Cox, C. C. 118. If, however, either of them pleaded guilty, or was not given in charge to the jury (*Winsor v. R.* (1866), L. R. 1 Q. B. 390; 35 L. J. M. C. 161; 10 Cox, C. C. 276; 14 L. T. 567), or was acquitted during the trial, or the prosecution entered a *nolle prosequi* in respect of him, he could be called as a witness either for the prosecution or for the defence: see the cases cited in Arch. 320; Rosc. 122; 2 Tayl. Ev. 882-3. Under the present Act either A. or B. can be called as a witness for the defence upon his own application. A., therefore, can upon his own application give evidence for the defence. Such evidence, it seems, may be directed to showing:—

- (1) Simply, that A. is not guilty of the offence charged.
- (2) That neither A. nor B. is guilty of the offence.
- (3) That the offence was committed by B., or by a third person, and not by A.
- (4) That A. is guilty, but B. is not guilty of the offence.

² **Comment on Defendant's not giving evidence.**—This enactment prevents any comment by the *prosecution* on the abstention of the defendant, or the defendant's wife or husband, from giving evidence. It appears, however, in no way to fetter the power of the presiding magistrate or Judge to make such comment, to whose discretion and sense of fairness

§ 1. the power of commenting is left; and the desirability of putting the defendant in the witness-box must largely depend upon the way in which this discretion is exercised.

The right to comment on the defendant's not giving evidence is a subject which has given rise to much discussion and contention in the principal British Colonies, and upon which Judges have expressed the most divergent views. In South Australia the Legislature has enacted that "no presumption of guilt shall be made from the fact of such person electing not to give evidence." The New Zealand Legislature meanwhile has taken the step of enacting that:—"If a person charged with an offence shall refrain from giving evidence, or from calling his wife or her husband as a witness, no comment adverse to the person charged shall be allowed to be made thereon;" and the Legislatures of Canada and of Victoria respectively have passed similar enactments. The New South Wales Act does not deal with the question of comment, but merely enacts that every person charged with an indictable offence, and the husband or wife, "shall be competent but not compellable to give evidence": see these enactments *in extenso* in Appendix, *post*, pp. 93 *et seqq.* Under the latter Act, in a case argued before the Full Court of seven Judges, it was contended that it was not permissible for a Judge to comment upon the defendant having refrained from giving evidence, for if an inference of his guilt were to be drawn from his not giving evidence, this was in effect "compelling" him to give evidence on oath, whereas the Statute intended that no sort of compulsion, direct or indirect, was to be put upon him to give such evidence. Two out of the seven Judges agreed with this contention, which was, however, overruled by a majority of five Judges, who held that it was permissible for the Judge to make such comment, and to invite the jury to draw inferences adverse to the prisoner from the fact that he failed to contradict or explain matters

upon which incriminating evidence had been given by the prosecution, and which, if untrue, it must be within his power to contradict or explain: *R. v. Kops* (1893), 14 New South Wales Law Reports, 150. On appeal the decision of the majority of the Full Court was upheld by the Privy Council, who held that the word "compellable" meant, as in s. 2 of the English Evidence Act, 1851, "compellable by process of law": *Kops v. R.* (1894), A. C. 650; 6 R. 522; 70 L. T. 890; 58 J. P. 668. § 1.

In that case Lord Herschell, L.C., in delivering the judgment of the Board, said: "The learned Judges did not lay down—it was not within the scope of the case necessary to lay down—any general rule as to such comments. There may no doubt be cases in which it would not be expedient, or calculated to further the ends of justice, which undoubtedly regards the interests of the prisoner as much as the interests of the Crown, to call attention to the fact that the prisoner has not tendered himself as a witness, it being open to him either to tender himself or not, as he pleases. But on the other hand, there are cases in which it appears to their Lordships that such comments may be both legitimate and necessary": (1894) A. C. at 653. This passage has now become applicable to criminal trials in England and Scotland.

As an accused person must in almost every conceivable case, except when insane, be in a position to tell the jury whether he did or did not commit the act constituting the offence charged, and as some persons appear to attach much more weight to his oath denying it than to a plea of not guilty, it does not require much experience of criminal courts to perceive how delicate becomes the task of counsel defending a prisoner under such a law. He is placed between the horns of a dilemma, having to choose one of two courses, viz. :—

- i. To call the defendant as a witness, although he is, as a general rule, under very great tempta-

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tion to commit perjury, and he may appear to great disadvantage under cross-examination ; or

- ii. To abstain from calling him, and so submit to the risk of adverse comments being made from the Bench on his absence from the witness-box.

The difficulty of this position in the view of those who have had much experience of such a law can hardly be overstated. Although this section provides that the defendant shall not be called as a witness "except upon his own application," and he no doubt must finally decide whether he will give evidence or not ; in cases where he has a legal adviser, he naturally appeals as a general rule to him as to whether it is better for him to give evidence or not. Experience has shown how sound were the views expressed by Sir James Fitzjames Stephen in 1863 as to leaving the discretion of calling the prisoner or not in the hands of his counsel. "The exercise of this discretion would introduce all sorts of difficulties into the case. To the counsel for the prisoner it would be a most painful discretion. By not calling the prisoner he might expose himself to the imputation of a tacit confession of guilt ; by calling him he might expose an innocent man to a cross-examination which might make him look guilty : " *General View of the Criminal Law of England* (1863), 202.

The difficulty of the position is increased by the comments that may subsequently be made, not merely in case the prisoner abstains from giving evidence, on his absence from the witness-box, but in case he gives evidence, on the strong temptation he is under to commit perjury. What is the value of the evidence, it is asked over and over again, of a man who is so keenly interested in establishing his innocence ? Such comment, adapted to either event—in many cases most detrimental to a fair trial—is fortunately not open, under the present Act, to the counsel for the prosecution, who is thus limited to the latter line of comment only, viz., to making observations on the

likelihood of the prisoner's evidence being false. But both lines are open to the Judge or presiding Magistrate, and the fairness of a trial must largely depend upon the manner in which this power is exercised. § 1.

It is submitted that the meaning of the present Act, according to its true construction, is to enable an accused person to give evidence, but not directly or indirectly to render it compulsory on him to do so; and that it is highly undesirable in the interests of justice that the right of comment should be exercised in a manner calculated to put such pressure on him by indirect or "moral" compulsion as to force him to do that which the Act intends he shall not be compelled to do. Where it becomes the usual course for the Judge to comment on the defendant's not giving evidence as nearly equivalent to an admission of guilt, it becomes an almost invariable practice for the defendant, whether innocent or guilty, to go into the box and deny his guilt on oath. On consulting his legal adviser before the trial comes on, he may be informed: "You can give evidence on oath, if you choose; you are not bound to do so, and of course I advise you not to swear to what is untrue. If, however, you do not give evidence, the Judge will probably comment upon the fact to the jury, and tell them that, as you yourself must be aware of your own guilt or innocence, they are entitled to draw the inference from your not giving evidence that you cannot truthfully deny the evidence given against you." If such advice has to be given, it is not difficult to foresee that in 99 cases out of 100, the defendant will give evidence. "To say to an accused: 'You can give evidence; and if you do not, we will infer you guilty'—for that is what it really comes to—is to put upon him the strongest conceivable compulsion": *per* Innes, J., in *R. v. Kops* (1893), 14 New South Wales Law Reports, at 196. Moreover, the provision made by the present section that the defendant's failure to give evidence

§ 1. shall not be made the subject of any comment by the prosecution, becomes practically nugatory if such comment is usually made from the Bench.

Effect of new law on onus of proving guilt.— Another aspect of the matter is presented when one considers the question of the onus of proving guilt. Hitherto before an accused person could be convicted, it has been incumbent on the Crown to prove his guilt beyond all reasonable doubt. It is apprehended that the present Act is in no way intended to alter this salutary rule, but unless great care be exercised in its administration, there is considerable risk in certain cases of the rule being ignored. It not unfrequently occurs that the evidence for the Crown establishes a slight *prima facie* case of such a kind that the Judge will not absolutely withdraw it from the jury, but will suggest to them that it is not safe to convict. In such a case is the defendant now absolutely bound to go into the box? In other words, if he does not, will the Judge tell the jury that, although the Crown case is slight, the defendant has not chosen to answer it on oath, and therefore they may infer that he cannot do so?

On this point some observations of Mr. Justice M. H. Stephen in the Supreme Court of New South Wales seem well worthy of attention. Referring to the question whether the change in the law had had the effect of allowing an inference to be drawn from the mere fact of the prisoner's not giving evidence, he said: "The argument in favour of the contention is that a *prima facie* case having been made out, it is only natural and reasonable that the accused, having now the opportunity of being examined on oath, would give evidence on his behalf, unless conscious that the evidence against him is true or incapable of explanation, and that the Legislature must be taken to have granted the privilege with this consequence attendant upon its non-acceptance. This brings us face to face with the question, whether, if this is so, the accused has not, by being rendered 'competent'

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to give evidence, practically had compulsion put upon him to do so, and whether this is what the Legislature has intended and so expressed. He is told: 'A *prima facie* case has been made out against you, and the presumption of your innocence no longer exists. You may give evidence upon oath.' He replies: 'What if I do not?' 'In that case, and because of your not doing so, any fact supposed to be within your knowledge may be taken as true—in all probability will be so taken; any matter, that requires explanation and that you do not explain, will in all probability be considered as susceptible of none.' The accused is thus confronted with a danger from which he can only escape by presenting himself for cross-examination, no matter how cogent and just his reasons may be for not subjecting himself to the ordeal. The innocent man runs the risk of committal for perjury in case of an adverse verdict. The guilty man is tempted to commit perjury to avoid the consequence of refraining from giving evidence. That this is indirect compulsion, no one can, I think, reasonably deny. And I submit that the Legislature did not intend to put compulsion, direct or indirect, upon any one. * * * The Legislature meant, I think, to say to an accused person: 'You need not consider yourself under any compulsion to give evidence. You have an unfettered option, without any risk of suspicion attaching to your silence.' * * *

"It is said that the Act must be regarded as having been passed not alone in the interest of accused persons, but generally to advance the administration of justice. I cannot but think that what was supposed to advance the administration of justice was to enable an accused to tell his own tale, if he thought fit, with the additional credit that might be attached to the taking of an oath, and it was not supposed, nor was the Act passed with the view, that the administration of justice would be advanced by enabling a jury to draw conclusions against an accused if he

§ 1. should not offer himself as a witness. * * * An accused can only be convicted if no theory can be advanced consistent with his innocence—if the only rational conclusion is that of guilt. Is it now to be considered that the jury in deciding the question may make it a factor in their conclusion that the accused has not denied or explained on oath? May they say in a case where a theory on the facts in evidence may be propounded consistent with the accused's innocence, that the theory of the Crown may be adopted because of accused's failure on oath to explain or contradict? Where no explanation or theory whatever is put forward on accused's behalf, it appears to me that the ends of justice have been and still are amply secured by instructing the jury that the facts deposited to on behalf of the Crown remain uncontradicted and unexplained, leaving the jury to draw from them alone the inference of guilt. * * * But it appears to me to be going farther than is warranted to allow the jury to assume, because of the accused not on oath denying such and such allegations, that he must be conscious that they are true. It is this conclusion that I object to, that the allegations may be taken to be true because this particular course is not adopted by the accused. It is virtually speculating upon the accused's conduct, the reasons and motives actuating him being wholly unknown. It is very near, if not equivalent, to holding that the accused's absence from the box is tantamount to an admission, and that the verdict may be taken *pro confesso*. * * *

"The accused is on his trial; he has by his plea denied his guilt, and it is the duty of the Crown to establish the case against him. If it makes out a *prima facie* case against him, the accused may tell his own story or not as he pleases. He may exculpate himself if he can, but by saying nothing does he inculcate himself? Does he add an additional element to the Crown case by remaining silent?" *R. v. Kops* (1893), 14 New South Wales Law Reports, at 198-9, 200-1.

The purpose of quoting these observations at length is not to argue that a Judge or Magistrate has in no case the right to comment on the defendant's failure to give evidence, but to point out the existence of cogent reasons for exercising the right with extreme caution, and some of the evil results likely to ensue if such right is freely exercised. § 1.

The question of cross-examination of the defendant is dealt with in notes ⁵ and ⁷, *post*, pp. 29, 30.

³ **Exceptions to the partial incompetency of Defendant's wife or husband.**—The following cases are exceptions to the general rule that a defendant's wife or husband can only be called as a witness for the defence, and upon the defendant's application :—

(i) Where the offence charged is an offence under any enactment mentioned in the Schedule to this Act: see s. 4 (1), *post*, p. 39, and Table of Offences, *post*, p. 58.

(ii) Where the case is one in which the wife or husband can at common law be called as a witness (*e.g.* personal injury inflicted by one on the other): see s. 4 (2), *post*, p. 39, and note ³, *post*, p. 44.

(iii) Proceedings mentioned in the Evidence Act, 1877 (non-repair of, or nuisance to, highway, etc.): see s. 6 (1), *post*, p. 50, and note ², *post*, p. 52.

⁴ **Disclosure of communications between husband and wife.**—It is difficult to gather from the text-books what is the rule of law as to disclosing communications made between husband and wife during the marriage: see *e.g.* 1 Tay. Evid. pp. 589—591; Rosc. 116-7. Section 3 of the Evidence Amendment Act, 1853 (16 & 17 Viet. c. 83), enacts that:

“No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.”

Some learned text-writers place such communications among classes of evidence which the law

§ 1. positively *excludes* on grounds of public policy : 1 Tay. Evid. p. 589 ; Greenleaf, Evid. s. 236 ; maintaining "that the confidence subsisting between husband and wife should be sacredly protected and cherished in its most unlimited extent" : *ibid.* s. 334 ; cited by the Supreme Court of Kentucky in *Scott v. Commonwealth* (1893), 42 Amer. State R. 371, at 373 : see this case referred to, *post*, p. 27. But a comparison of the language of section 3 with that of the other sections of the Act of 1853 (printed in Appendix, *post*, pp. 71-72), appears to support the view that a husband or wife should now be *permitted* to disclose such a communication, if it be otherwise admissible, in all cases in which he or she is a competent witness and is willing to do so. The English cases cited in Judge Taylor's work in support of the contrary proposition were decided at a time when the husband or wife of a party to a suit were not competent to give evidence at all. Lord Alvanley's reasons in *Monroe v. Twistleton* (1802), Peake, Add. Cas. 221, for not permitting a divorced wife to give evidence against her former husband—reasons given at a time when, in the absence of misconduct, she would not (with rare exceptions) have been a competent witness—do not appear to have equal force at a time when a wife is a competent witness without her husband's consent in all civil cases, and in many criminal proceedings against him, and with his consent in all criminal proceedings. At the present day when a wife can prosecute her husband for stealing her property, and can give evidence against him at the trial, the reasons formerly given for not *permitting* her to disclose any communication made to her by him seem to have lost their force.

Moreover in the exceptional cases above referred to, it was competent at common law for a wife to give evidence against her husband—*e.g.* for a personal injury inflicted on her by him—and in proceedings against him, say, for assault with intent to do her grievous bodily harm, it is conceived that she

would always have been permitted to give evidence of "confidential communications" made to her by him, whether during, or prior or subsequent to, the assault, which were at all relevant to the charge. § 1.

It will be observed that section 3 of the Evidence Amendment Act, 1853, enacts that "no husband shall be compellable to disclose any communications made to him by his wife during the marriage," but it does not expressly protect him from disclosing a communication made by himself to his wife. It is apprehended, however, that such a case is within the equity of the statute, and that a husband cannot be compelled when in the box to disclose a communication made by him to his wife; for if it were otherwise, and both husband and wife gave evidence, and each were compelled to disclose what was said by him or herself to the other, the above enactment would be rendered nugatory.

It has been considered doubtful whether the rule, which is founded on the desirability of preserving domestic peace, applies to a widowed or divorced person, questioned after the dissolution of the marriage as to what had been communicated to him or her whilst it lasted: see Stephen's Digest of Evidence, Art. 110, note, 3rd ed. p. 115; 4th ed. p. 126. The better opinion seems to be that it does apply to such person: see the cases cited in 1 Tay. Evid. p. 591; Rosc. 116-7.

A letter, written by a prisoner to his wife and voluntarily given up by her, has been held in the United States to amount to a confidential communication between them, and therefore not admissible in evidence against him; for it was said to be against the policy of the common law to permit such "a disclosure of what had been written by her husband in the privacy and confidence of the marital relation," and a written communication should be protected as much as though it were said by him: *Scott v. Commonwealth* (1893), 42 Amer. State R. 371. The same view was taken by Kelly, C.B., as to a similar letter,

§ 1. intercepted by a constable who had undertaken to post it: *R. v. Pamentor* (1872), 12 Cox, C. C. 177; but it would seem very doubtful whether this be law: *cf.* 1 Tay. Evid. p. 569. A conversation between a husband and wife may be proved by third persons who are present at or who overhear it: *R. v. Smithies* (1832), 5 C. & P. 332; *R. v. Simons* (1834), 6 C. & P. 540; *R. v. Bartlett* (1837), 7 C. & P. 832.

Summary of the law as to disclosure of communications between husband and wife.—The rules, which are now applicable to the disclosure of mutual communications between a husband and wife made during the marriage, may be stated thus:—

1. In no case is a husband or wife *compellable* to disclose any such communication.

This rule is applicable (it is submitted) to such a communication made *by*, as well as to one made *to*, the witness.

The rule still holds good (it is submitted) after the death or divorce of the witness's wife or husband.

2. Whenever a husband or wife is a competent witness, he or she is *at liberty* (it is submitted) to disclose such a communication, if otherwise admissible.

But this proposition appears to be doubtful: see *ante*, pp. 25-26.

The husband or wife is a competent witness for either side:—

- (a) In civil proceedings;
- (b) In such criminal proceedings as are specified in note ³, *ante*, p. 25.

In all other criminal proceedings (except Courts Martial, as to which see s. 6 (2), *post*, p. 50, and notes ³ and ⁴, *post*, pp. 53-54) the defendant's husband or wife is not a competent witness except for the defence, and upon the defendant's application.

3. Such a communication, if otherwise admissible, can be proved by a third party who has overheard it, or if in writing (it is submitted) by putting the document in evidence.

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⁵ **Cross-examination of Defendant tending to criminate him as to offence charged.**—Although the defendant may be asked any question that would tend to criminate him as to the offence charged, this clause does not expressly enact that he shall be compelled to answer; and it is apprehended that he may decline to answer such question just as an ordinary witness might. The general rule is thus stated by Sir J. F. Stephen: "No one is bound to answer any question if the answer thereto would, in the opinion of the Judge, have a tendency to expose the witness [or the wife or husband of the witness] to any criminal charge, or to any penalty or forfeiture which the Judge regards as reasonably likely to be preferred or sued for": Stephen's Dig. Evid. 3rd ed. 120-1; 4th ed. 132. (The square brackets appear to have been used by that learned writer to indicate some doubt.) Cf. 2 Tay. Evid. pp. 960—966; Arch. 328—330; Rosc. 139—142.

If a defendant were to decline to answer such a question as this clause of the Act permits to be put to him, it may be assumed that his doing so would usually have much the same effect as his answering it in favour of the prosecution.

As to cross-examining a defendant as to other offences alleged to have been committed by him, see s. 1 (*f*), *ante*, pp. 14-15, and notes ⁶ and ⁷, *infra*.

⁶ **When evidence that Defendant has committed offence other than offence charged is admissible, and when not.**—The rule which excludes evidence that the defendant has committed another offence forms part of the general rule which excludes evidence of facts similar to, but unconnected with, the facts in issue. As to when evidence of such other offence is or is not admissible, see Stephen's Digest of Evidence, Arts. 10-12, 3rd ed. pp. 15-20; 4th ed. pp. 14-20; and note vi., 3rd ed. p. 147; 4th ed. p. 162.

The meaning of the rule is that, according to our

§ 1. law of evidence, inferences are not allowed to be drawn "from one transaction to another which is not specifically connected with it merely because the two resemble each other. They must be linked together by the chain of cause and effect in some assignable way before you can draw your inference:" Stephen's Dig. Evid. 3rd ed. 147; 4th ed. 163.

"This is the rule which prevents a man charged with a particular offence from having either to submit to imputations which in many cases would be fatal to him, or else to defend every action of his whole life in order to explain his conduct on the particular occasion:" *ibid.* 3rd ed. 148; 4th ed. 163.

ILLUSTRATIONS.

1. C. is indicted for an infamous crime. Evidence that C. formerly committed a crime of the same sort, with the view of showing that he has a tendency to commit such crimes, is inadmissible: *R. v. Cole* (1810), by all the Judges, 1 Phil. Evid. 10th ed. 508; Arch. 248; Rosc. 87; *cf. R. v. Oddy* (1851), Court for C. C. R. 2 Den. C. C. 264; T. & M. 593; 5 Cox, C. C. 210; 20 L. J. M. C. 198; Arch. 250, 501; Rosc. 91.

2. M. and his wife are indicted for the murder of an infant. The body of the child, which they had undertaken to adopt for a premium of £3, was found buried in the back garden of a house from which they had removed two days after receiving the child. Evidence that the prisoners had adopted other infants upon payment of small sums, and that the bodies of infants had been found buried in the gardens of several other houses occupied for a time by the prisoners, is admissible: *Makin v. Att.-Gen. for New South Wales* (P. C.), (1894) A. C. 57; 63 L. J. P. C. 41; 6 R. 373; 69 L. T. 778; 17 Cox, C. C. 704; *R. v. Makin* (1893), 14 New South Wales Law Reports, 1, 548.

In Scotland a similar rule has hitherto prevailed: see Criminal Procedure (Scotland) Act, 1887, s. 67, Appendix, *post*, p. 90; and as to the effect on that enactment of the present section, see note ⁷, *infra*.

⁷ Cross-examination of Defendant as to his past career and character.—This clause appears to extend indefi-

nately the opportunity of attacking the character of an accused person who gives evidence, and to be likely to have very far-reaching consequences. It is not easy to see what kind of defence can be raised, except perhaps that of an alibi or of the insanity of the defendant, which will not necessarily "involve imputations on the character of the prosecutor" or of some witness for the prosecution; and if any such defence is raised—if any imputation is made on the character of a witness for the prosecution, however much it may be justified—or if the defendant has given evidence against any other person charged with the same offence (clause (iii), *ante*, p. 15); the defendant may be cross-examined not only as to his own character, but as to a previous conviction of any offence whatever, and even as to a charge, whether well-founded or not, at any time made against him. In a case in which an accomplice is called as a Crown witness—no uncommon event—the defence by attacking his character will subject the defendant, if he desires to give evidence, to be cross-examined as to the whole of his past life. Under such conditions, supposing the defendant to have several previous convictions recorded against him, it is to be feared that it may tax the power of a strong Judge to secure a fair trial according to British notions.

It was perhaps intended that while the clause numbered (i) is an exception to the rule that the defendant shall not be cross-examined as to other offences, the clause numbered (ii) should refer only to cross-examination as to the defendant's bad character; but there seems nothing in the words of the enactment so to limit its construction, and if the character of a Crown witness is impugned, even indirectly by the *nature* of the defence, it would seem that the defendant may be cross-examined as to any offence committed by him at any time. Yet if a witness for the Crown is of bad character, as must sometimes occur, it can hardly be in the interests of justice to punish with such severity any

§ 1. imputation against him on the part of the defence. Unless the Judges lay down and enforce some rules for restricting such cross-examination, there seems to be no small danger of its exceeding proper bounds.

This clause will effect the same change in the practice in Scotland; see s. 67 of the Criminal Procedure (Scotland) Act, 1887, Appendix, *post*, p. 90.

⁸ **Cross-examination of Defendant as to his character, if he implicates another.**—Under this clause if a defendant *himself* gives evidence implicating *another person charged with the same offence*, he is liable to be cross-examined both as to his own character and also as to whether he has committed, or has been convicted of, or charged with, any other offence.

It has been suggested by one learned writer that it is not necessary under this clause that the defendant should have given such evidence in the course of the same proceedings, and that it will probably suffice if such evidence was given upon another occasion and in other proceedings, the construction of the clause leaving this matter open to doubt: Article by Mr. Pitt-Lewis, Q.C., in *The Nineteenth Century*, October, 1898, p. 599. It is submitted that to put on this clause the construction suggested would be straining the meaning of a penal provision, which, if open to doubt, should receive the most favourable construction *in favorem libertatis*. To have to enter in the course of a criminal trial into a side issue with respect to evidence which the defendant might have given at any time in other proceedings instituted against another person might cause the greatest perplexity and confusion. It is conceived that this clause must be limited to evidence given by the defendant in the course of the same proceedings.

If the defendant merely calls a witness to give evidence against any other person charged with the same offence, but does not himself give such evidence; or if the defendant himself gives evidence

against another person who is *not* charged with the same offence, and is not the prosecutor nor a witness for the prosecution (see preceding note), the defendant will *not* thereby render himself liable to such cross-examination. Most of the observations made in the preceding note are also applicable to this clause.

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⁹ **Defendant's Statement before a Magistrate.**—Section 18 of the Indictable Offences Act, 1848—11 & 12 Vict. c. 42—directs the Magistrate at the examination before him, in a case not to be dealt with summarily, after cautioning the accused, to take down in writing any statement he may wish to make. Such statement may afterwards be given in evidence against him on his trial: Arch. 266; Rosc. 55, 59.

¹⁰ **Unsworn Statements made by Defendant.**—A person charged with an offence has a right to make a statement:—

- (a) At the examination before the Magistrate, where the case is not to be dealt with summarily, under s. 18 of 11 & 12 Vict. c. 42: see note ⁹, *supra*.
- (b) On his trial for an offence tried summarily: The Summary Jurisdiction Act, 1848—11 & 12 Vict. c. 43—ss. 12, 14: and 18 & 19 Vict. c. 126, s. 4.
- (c) On his trial at Quarter Sessions or Assizes: as to which, see *infra*.

By the present clause (*h.*) nothing in this Act is to affect *any* right of the person charged to make a statement without being sworn.

The right to make such a statement upon his trial at Quarter Sessions or Assizes is a common law right established by the practice of the Courts. After many contrary rulings by Judges with respect to the proper practice to be followed (see note in 15 Cox, C. C. 124; *cf.* Stephen's General View of the

§ 1. Criminal Law, 2nd ed. 187), it was in 1882 laid down that the course to be adopted at trials in future was as follows:—A prisoner, whether defended by counsel or not, may make a statement to the jury giving his own version of the facts; and the time allowed for doing this is after his counsel has addressed the jury (surely not a convenient order of procedure, since his counsel is thus not able to comment upon, and is not, it seems, even allowed to foreshadow or refer to, his own client's version of the facts, unless he is in a position to prove it by sworn testimony: see *per* Coleridge, J., in *R. v. Beard* (1837), 8 C. & P. 142)—and such statement is subject to a right of reply on the part of the prosecution on the new matter thus laid before the jury: *per* Cave, J., in *R. v. Shimmin* (1882), 15 Cox, C. C. 122. As to the right of reply, however, see now s. 3 of this Act, and note thereto, *post*, pp. 35-36. As to such statements by prisoners, see Arch. 181-2; Rosc. 203-4.

When, therefore, the prisoner desires to make a statement, his counsel must address the jury first; when the prisoner desires to give evidence on oath, his counsel must address the jury afterwards: s. 2, *infra*.

The question whether the Crown has a right to call evidence in reply to contradict a statement by a prisoner has perhaps never been raised in English Courts. In New South Wales, where the prisoner has a statutory right to "make any statement at the close of the case for the prosecution, and before calling any witness in his defence," it has been held that where he makes a statement but calls no evidence, the Crown may give evidence to contradict his statement: *R. v. Chantler* (1891), 12 New South Wales Law Reports, 116.

2. Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution.¹ **§ 2.** Evidence of person charged.

¹ **Time for calling Defendant as witness.**—Where the defendant wishes to give evidence as to the facts, and to call witnesses to character only, he must under this section give his own evidence first. Where any of his other witnesses speak as to the facts of the case, the witnesses (including himself) can be called in any order he pleases.

Speech for defence, when Defendant is the only witness.—This section to some extent modifies the existing right, conferred by 28 & 29 Vict. c. 18, s. 2 (Arch. 182; Rosc. 202), of a prisoner or his counsel to make two speeches—one to open his case, and the other to sum up his evidence; for where the defendant is the only witness to the facts of the case, he must be “called as a witness immediately after the close of the evidence for the prosecution,” and he or his counsel will be limited, it would seem, to a single speech at the close of the evidence.

As to how far in certain cases the existing right of counsel for the prosecution to sum up is affected by the present Act, see note ¹ to s. 3, *post*, pp. 36-37.

Unsworn Statement.—Nothing in this Act affects the defendant’s right to make a statement to the jury without being sworn: s. 1 (*h*); see note ¹⁰, *ante*, p. 33.

3. In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a wit- Right of reply.

§ 3. ness shall not of itself confer on the prosecution the right of reply.¹

¹ **Right of Reply.**—The rule as to the right of reply which has been in force for many years up to the commencement of this Act is that if any evidence is called for the defence, the counsel for the prosecution has the right to reply; if no evidence is called for the defence, the counsel for the prosecution has no such right, unless that counsel is the Attorney-General or Solicitor-General of England prosecuting *in person* in a Crown case: resolution of the Judges in 1887, 5 St. Tr. N. S. 34. This special privilege of the Law Officers of the Crown seems to be a relic of political prosecution, and in the opinion of Judge Taylor and others “is a custom more honoured in the breach than the observance:” 1 Tay. Evid. pp. 275-6. If one of several defendants alone calls evidence, it has sometimes been held that this gives the prosecution a right of reply as to all; but the reason for this ruling is not apparent, and the better opinion is that in such a case the right of reply is limited to replying to the case of the single defendant who calls evidence. *Cf.* Arch. 182, 123; Rosc. 204-5. If witnesses for the defence are called to *character* only, a reply for the prosecution is unusual, and regarded as a somewhat rigorous exercise of strict right.

The present section is apparently taken from a similar enactment in the South Australian Act of 1882—45 & 46 Vict. No. 245—s. 4, printed in Appendix, *post*, p. 103.

This section, when read in connection with s. 2 of the Act of 1865—28 & 29 Vict. c. 18—(*infra*), appears to go a considerable length in curtailing the right of speech of the counsel for the prosecution, and to place him at some disadvantage. The right of the counsel for the prosecution to sum up his evidence was first given by that enactment, the first clause of which, declaring in what event such right shall

be called into existence, enacts as follows: "If any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding Judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel whether he or they intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants." The word "counsel" includes solicitors appearing as advocates: *ibid.* s. 9. § 3.

On the construction of the above clause of the Act of 1865, it seems clear, according to the maxim *expressio unius est exclusio alterius*, that in the event of any of the prisoners' counsel "thereupon announcing his intention to adduce evidence," the counsel for the prosecution shall *not* be allowed to sum up his evidence. If the prisoner's counsel then, after announcing his intention to adduce evidence, calls the prisoner as his only witness—and if he does this, he must call him "immediately after the close of the evidence for the prosecution": s. 2, *ante*, p. 35—the counsel for the prosecution cannot be allowed to sum up his evidence, while the fact that the prisoner has been called as a witness shall not, under the present section, "of itself confer on the prosecution the right of reply." It seems to follow that in such a case the counsel for the prosecution cannot be allowed a second speech, either to sum up his evidence or to reply.

It is conceived that another effect of the present section will probably be to alter the rule of practice, which Mr. Justice Cave announced was to be followed in future, *viz.*, that if the defendant make an unsworn statement, the prosecution would have a right of reply on the new matter thus laid before the jury:

§ 3. *R. v. Shimmis* (1882), 15 Cox, C.C.122; *cf.* s. 1 (*h*), and note ¹⁰, *ante*, pp. 33-34. For as s. 3 expressly declares that the fact of calling the defendant as a witness shall not of itself confer on the prosecution the right of reply, it would seem hardly consistent with that enactment if the fact of the defendant making a statement without being sworn should now be held to confer a right of reply.

Evidence in reply.—This section does not appear to affect the right of the prosecution to *call evidence* in reply, although the defendant has been the only witness called for the defence. The general rule is that the Crown must (like the party beginning in a civil action) bring forward in the first instance all the evidence necessary to complete the case for the prosecution; but whenever the defendant gives evidence to prove entirely new matter, which the Crown could not have foreseen, the Crown is entitled to give evidence in reply to contradict it, such evidence being strictly confined to matters in reply: *R. v. Frost* (1840), *Monmouth Special Commission, coram* Tindal, C. J., Parke, B., and Williams, J., 9 C. & P. 129, at 159.

ILLUSTRATION.

F. and others are indicted for high treason, and charged with marching with 2,000 men into Newport and making a warlike attack upon a house and firing upon magistrates, soldiers and constables assembled therein. Evidence having been given by H. and other witnesses to prove the facts alleged by the prosecution, W. is called for the defence, and in order to show that the object of the rioters was not treasonable but was merely to get certain prisoners released, states that one of the rioters when approaching the house, on being asked by a constable what they wanted, answered: "Surrender up your prisoners." H. can be called by the Crown in reply to contradict this statement: *R. v. Frost* (1840), *ubi supra*.

Where evidence in reply is properly admissible, and is called, it is apprehended that, even in a case where the defendant alone has given evidence for the

defence, the counsel for the Crown will have a right to make a speech in reply; for although the fact that the defendant has been called as a witness does not of itself confer the right of reply, the fact that evidence has been properly called in reply to contradict his evidence would seem to confer such right. § 3.

4.—(1.) The wife or husband of a person charged with an offence under any enactment mentioned in the Schedule to this Act¹ may be called as a witness either for the prosecution or defence and without the consent of the person charged.² Calling of wife or husband in certain cases.

(2.) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.³

¹ See Schedule, *post*, p. 55; and Table of Offences referred to in Schedule, *post*, pp. 58—61.

² In what cases the Defendant's wife or husband may be called as a witness for the prosecution by Statute.

(i) Offences referred to in Schedule to Act.—Whenever a defendant is charged with any offence referred to in the Schedule (for a list of such offences see the Table, *post*, p. 58), the defendant's wife or husband may be called as a witness for the prosecution.

If the defendant is charged in one count of an indictment with committing an offence referred to in the Schedule to this Act, and in a second count with committing an offence not referred to in the Schedule, and if the defendant's wife or husband

§ 4. is called for the prosecution to give evidence as to the former offence, it becomes the duty of the Judge to warn the jury that the testimony of the wife or husband is admissible for the prosecution only on the first count, and that if they acquit the defendant on that count, they ought in considering the second count wholly to disregard any incriminating testimony given by the wife or husband: see *R. v. Paul* (1890), C. C. C. R., 25 Q. B. D. 202, at 210; 62 L. T. 845, at 848; 59 L. J. M. C. 138; *cf. R. v. Fuidge* (1864), L. & C. 390; 33 L. J. M. C. 74; for "each count is as it were a separate indictment": *per* Blackburn, J., in *Latham v. R.* (1864), 5 B. & S. 635, at 642-3; 33 L. J. M. C. 197, at 199; 9 Cox, C. C. 516. If the Judge fails to give such warning, and the defendant is convicted on the second count only, the conviction will be quashed: *R. v. Paul*, *ubi supra*.

If, however, instead of there being *two counts* in the indictment, there is a *single* count, with respect to which the defendant's wife or husband can be and is called as a witness for the prosecution, and if it is competent for the jury, under a special statutory enactment, upon that indictment to find the defendant guilty of another offence, with respect to which the testimony of the wife or husband would not be admissible for the prosecution; although without the testimony of the wife or husband there is not sufficient evidence to convict of either offence, yet it has been held that it is competent for the jury to have regard to such testimony when considering the second offence; and where they convicted the defendant of the latter offence only, the conviction was upheld: *cf. R. v. Wealand* (1888), C. C. C. R., 20 Q. B. D. 827; 57 L. J. M. C. 44; 58 L. T. 782; and the observations upon it in *R. v. Paul* (1890), 25 Q. B. D. at 212.

In the case of *R. v. Wealand* the indictment contained a single count charging the defendant with unlawfully and carnally knowing a girl under the

§ 4.

age of 13, which is a felony under s. 4 of the Criminal Law Amendment Act, 1885. The girl, who did not understand the nature of an oath, gave evidence not upon oath, as she is enabled to do by that section upon that charge. The jury acquitted the prisoner of that charge, but found him guilty of indecent assault, as they are enabled to do by s. 9 of the same Act. There is no provision in that Act rendering unsworn testimony admissible upon an indictment for indecent assault; and apart from the girl's testimony, the evidence was insufficient to support the conviction. Upon a case stated for the opinion of the Court, the conviction was affirmed upon the ground that the evidence being expressly made admissible upon the only count contained in the indictment, the jury were entitled to take it into their consideration, while s. 9 expressly empowered the jury to find the verdict which they did find: *R. v. Wealand* (1888) (*ubi supra*), explained in *R. v. Paul* (1890), C. C. C. R., 25 Q. B. D. 202, at 212; 62 L. T. 845, at 848; 59 L. J. M. C. 138.

With regard, however, to the decision in *R. v. Wealand*, although there was only a single count, that count by virtue of s. 9 contained in effect two distinct charges, *viz.*, 1. unlawfully and carnally knowing a girl under 13 (a felony); 2. indecent assault (a misdemeanour): see *R. v. Guthrie* (1870), L. R. 1 C. C. R. 241; 39 L. J. M. C. 95; 22 L. T. 485. Such a joinder of a felony and a misdemeanour in one indictment is of course only permissible by virtue of a statute. The effect of this particular enactment—s. 9 of the Act of 1885—is analogous, it is conceived, to that of the enactment contained in s. 61 of the Common Law Procedure Act, 1852, which enabled a plaintiff in a civil action for libel or slander to succeed upon proving that the words set forth in his declaration and published by the defendant were actionable, without being required to prove the meaning attached to them in his declaration. After the passing of the latter enactment a

§ 4. single count for libel with an *innuendo* that the words were used in a particular sense was regarded "as if there were two counts, one with the *innuendo* and one without the *innuendo*": *per* Blackburn, J., in *Watkin v. Hall* (1868), L. R. 3 Q. B. 396, at 402; 37 L. J. Q. B. 125; 18 L. T. 561.

Again, independently of statutory enactment, where the offence charged in an indictment includes an offence of inferior degree, it is always competent at common law for the jury to acquit the defendant of the higher offence and convict him of the lesser, provided that both offences are of the same class, *i.e.*, either felonies or misdemeanours: *R. v. Hunt* (1811), 2 Camp. 583; *R. v. Taylor* (1869), L. R. 1 C. C. R. 194; 38 L. J. M. C. 106; 1 Cox, C. C. 261; 4 F. & F. 511; *R. v. Guthrie* (1870), L. R. 1 C. C. R. 241; 11 Cox, C. C. 522; 39 L. J. M. C. 95; 22 L. T. 485; *Boaler v. R.* (1888), 21 Q. B. D. 284; 57 L. J. M. C. 85; 59 L. T. 554; 16 Cox, C. C. 488. Accordingly, if the indictment contains a single count for murder, the prisoner can be convicted of manslaughter, each being a felony; if it contains a single count for malicious wounding, the prisoner can be convicted of common assault, each being a misdemeanour: see *R. v. Taylor* (1869), *ubi supra*. The decision in *R. v. Wealand* (*ubi supra*) is expressly limited, it is true, to the construction of s. 9 of the Act of 1885, but if the principle of that decision be correct it would also seem to apply to cases like those just mentioned of an indictment containing a single count, where it is competent for the jury at common law to find the defendant guilty of a lesser offence.

It is submitted, however, that the distinction between the decisions in *R. v. Wealand* and *R. v. Paul* is not well founded; that in the one case to allow the jury without warning to consider evidence upon a charge in respect of which it is inadmissible on the ground that the indictment as a matter of form contains only one count, although in effect it contains two charges; and in the other case to direct the jury

that they must not consider such evidence if each charge is contained in separate counts of the indictment: is to make a distinction not based upon sound principle; and that the principle of the decision in the later case of *R. v. Paul* ought to prevail. § 4.

ILLUSTRATIONS.

1. A. is charged on an indictment containing two counts:
 - (i) Indecent assault on X. (under s. 52 of the Offences against the Person Act, 1861, referred to in Schedule, *post*, p. 55).
 - (ii) Common assault on X. (under s. 47 of the same Act, not referred to in Schedule, *ibid.*).

If A.'s wife be called as a witness for the prosecution (under the present section), it is the duty of the Judge to direct the jury that, as A.'s wife is not a competent witness for the prosecution on the second count, if they acquit A. on the first count, they ought, in considering the second count, wholly to disregard any incriminating testimony given by A.'s wife: see *R. v. Paul* (*ubi supra*).

If the Judge fails to give such a direction, and A. is convicted on the second count only, the conviction will be quashed: see *R. v. Paul*, *ibid.*

2. A. is charged on an indictment containing a single count for indecent assault on X. (under s. 52 of the Offences against the Person Act, 1861, referred to in Schedule, *post*, p. 55). The jury are entitled at common law to acquit A. of the indecent assault and convict him of common assault.

If A.'s wife be called as a witness for the prosecution (under the present section), it is the duty of the Judge to direct the jury that, as A.'s wife would not be a competent witness for the prosecution on a charge against A. of common assault, if they acquit A. of indecent assault, they ought, in considering whether A. is guilty of a common assault on X., wholly to disregard any incriminating testimony given by A.'s wife: submitted; but see *R. v. Wealand* (*ubi supra*).

If the Judge fails to give such a direction, and A. is convicted of common assault only, the conviction should be quashed: submitted; but see *R. v. Wealand* (*ubi supra*).

(ii) Under Evidence Act, 1877. — Besides the case of an offence referred to in the Schedule, the defendant's wife or husband (as also the defendant himself) may be compelled to give evidence for the prosecution in proceedings for the non-repair of, or

§ 4. for a nuisance to, a highway, bridge, &c., or for trying or enforcing a civil right only, by virtue of the Evidence Act, 1877, which is not affected by this Act: see s. 6 (1), *post*, p. 50, and note ² thereto, *post*, p. 52.

³ In what cases the Defendant's wife or husband may be called as a witness for the prosecution at common law.

The rule with respect to this question of competency at common law is thus stated by Sir James Fitzjames Stephen:—

“In criminal cases the accused person and his or her wife or husband, and every person and the wife or husband of every person jointly indicted with him and tried at the same time is incompetent to testify.

“Provided that in any criminal proceeding against a husband or wife for any bodily injury or violence inflicted upon his or her wife or husband, such wife or husband is competent and compellable to testify”: Stephen's Dig. Evid. Art. 108, and see note *XLI.*, 3rd ed. 114, 178; 4th ed. 121, 194.

ILLUSTRATION.

A. and others are jointly charged with conspiring to take away B., an heiress, by force, and to marry her to A., and the prosecution alleges that B. has under duress been married to A. B. is a competent witness: *R. v. Wakefield* (1827), 3rd count, 2 Lew. C. C. at 10, 287; and Trial, pub. by Murray, at 7, 257; see Rosc. 119.

On the same principle, the dying declaration of a deceased wife or husband is admissible when her husband or his wife is charged with the homicide of the deceased: *R. v. Woodcock* (1789), 1 Leach, 500; *R. v. John* (1790), *ibid.* 504, n.; 1 East, P. C. 357; *Stoop's Case* (1799), Addison, R. (Pennsylv.) 381; Rosc. 119.

It appears, however, open to doubt whether the exception, stated by Sir J. F. Stephen as a proviso to the general rule, is expressed in terms sufficiently wide to cover every case in which such wife or husband was at common law a competent witness.

If, for instance, a man were charged with *fraudulent* abduction of a girl under twenty-one with intent to marry her (see now Offences against the Person Act, 1861, s. 53; Arch. 801; Rosc. 250), she was, although the marriage had taken place, a competent witness: *R. v. Wakefield* (1827), 1st count, 2 Lew. C. C. at 7, 287; and Trial, pub. by Murray, at 4, 143—155, 257; *R. v. Yore* (1839), 1 Jebb & Symes (Q. B. Ir.), 563; and the better opinion is that her competency was not affected by the fact that she had, whether from the first or subsequently, freely assented to the marriage: see 4 Black. Com. 209; 1 East, P. C. 454; 3 Russ. Cr. 5th ed. 624; Rosc. 119; *sed contra*, 1 Hale, P. C. 302.

§ 4.

Now in this case there need not necessarily be "any bodily injury or violence inflicted" upon her, for the offence will be complete if the girl has been fraudulently allured out of the possession and against the will of her father or mother, and married. If, therefore, she is a competent witness in such a case, her competency must rest on some other ground.

One ground sometimes put forward for admitting such testimony where a marriage has been brought about, whether by force or fraud, is that the marriage cannot have any obligation in law: see *e.g.*, Arch. 324, 803; 1 Hawk. P. C. 6th ed. c. 42, § 9. But although it is true that the contract of marriage, like any other contract, if brought about by duress or fraud may be invalidated: *Scott v. Sebright* (1886), 12 Pro. D. 21; 56 L. J. Pro. 11; 57 L. T. 421; such a contract is *voidable* only and not absolutely void, and the innocent party has an election either to avoid it or to insist upon it as a binding transaction: *Oakes v. Turquand* (1867), L. R. 2 H. L. 325; 36 L. J. Ch. 949. Until rescinded such a contract is valid: *Reese River Silver Mining Co. v. Smith* (1869), L. R. 4 H. L. 64; 39 L. J. Ch. 849; and acting voluntarily under it with a full knowledge of all the facts may amount to ratification: *Ormes v. Beadel* (1860), *coram* Lord Campbell, L. C., 2 De G. F. & J. 333; 30 L. J. Ch.

§ 4. 1; *cf.* 1 Hale, P. C. 302. If then the husband is indicted at a time when no steps have been taken (such as were taken in *Scott v. Sebright*, *ubi supra*), to obtain a declaration of the nullity of the marriage on the ground of duress or fraud, or if the wife voluntarily assents to the marriage and thus adopts the contract, the marriage cannot be said to have no obligation in law.

If force be employed against her, the employment of such force renders her, as has been seen, a competent witness (*cf.* Arch. 802); and if no force be used, as she is still a competent witness, it is submitted that her competency arises partly from the public mischief that would follow from the exclusion of her testimony if the husband were thus allowed to take advantage of his own criminal act, and partly from the consideration that she is in reality the prosecuting or aggrieved party: see *per* Crompton, J., in *Reeve v. Wood* (1864), 5 B. & S. 364, at 368; 34 L. J. M. C. 15; 11 Jur. N. S. 201; 10 Cox, C. C. 580. This seems to afford a more satisfactory ground for admitting such evidence than the one also suggested by the same learned judge—*viz.*, that in a case of fraudulent abduction “there may well be considered to be what is equivalent to an actual personal injury”: *ibid.* (cited by A. L. Smith, J., in *R. v. Lord Mayor of London* (1886), 55 L. J. M. C. 118, at p. 120; 54 L. T. 761; 16 Cox, C. C. 77; 50 J. P. 711). In the same case of *Reeve v. Wood*, Blackburn, J., treated the admissibility of such evidence in abduction cases as resting on the ground that “the offence charged touched the person of the wife,” although *no personal injury* were inflicted: 5 B. & S. at 369.

The decision of Hullock, B., on the first count in *R. v. Wakefield* (1827), *ante*, p. 45; and Illustration 1, *post*, p. 48, which followed the decision of Gibbs, C. J., when Recorder of Bristol, in *R. v. Perry* (1794), cited *ibid.* 2 Lew. C. C. at 280, is one of very high authority. The case excited the greatest public interest at the time, and after the conviction

of the Wakefields, the Act 7 & 8 Geo. 4, c. 66, was passed to declare the marriage void: 2 Lew. C. C. at 20-21. Eight very distinguished counsel—four on each side—seven of whom were subsequently raised to the Bench, were engaged in the case: *ibid.* 13; and a motion was made in the King's Bench in arrest of judgment upon another point, but no question was raised as to the Judge's ruling in admitting the wife's evidence: Deacon's Crim. Law, 4. The decision has frequently been the subject of judicial discussion, and twelve years later it was followed by the Court of Queen's Bench in Ireland in a considered judgment: *R. v. Yore* (1839), 1 Jebb & Symes, 563, at p. 572. § 4.

The only case which may appear to conflict with the principle of the decision on the first count in *R. v. Wakefield* is the earlier case of *R. v. Serjeant* (1826), Ry. & M. 352, where a prostitute was indicted jointly with others for conspiracy in procuring S., a lad of 17, to marry her, and at the trial S. having been tendered as a witness for the prosecution, Abbott, C. J., after citing *R. v. Locker* (1804), 5 Esp. 107, as an authority, said: "I think upon the whole it is *the safest course* in the present case not to receive the evidence of the husband"; and S. was accordingly not sworn. The defendants were convicted. In *R. v. Locker* (1804), L. was indicted jointly with W. and others for conspiracy in procuring a young lady, a ward of Court, to marry L. After L.'s case was concluded, W.'s counsel contended that he was entitled to call L.'s wife as a witness to exculpate W., not on the ground that she was a competent witness as regarded L.—a point which was not argued—but on the ground that although her testimony was inadmissible in respect of L., it was admissible in respect of his co-defendants—a hopeless contention (see *R. v. Frederick* (1737), 2 Str. 1095) which Lord Ellenborough, C. J., overruled.

It is submitted that *R. v. Locker* cannot now be regarded as an authority for the proposition that in

§ 4. a case of fraudulent abduction, where no force has been employed, the wife who has been abducted is not a competent witness; that *R. v. Serjeant* ought not to be followed at the present day, but that the husband in that case was a competent witness in accordance with the principle of the decision on the first count in *R. v. Wakefield*.

If this view be sound, the exception at common law to the general rule excluding in criminal cases the testimony of the wife or husband of an accused person may be stated thus:—

In any criminal proceeding against a husband or wife for any bodily injury or violence inflicted upon his wife or her husband, or for bringing about a marriage under such circumstances as to constitute a criminal offence, such wife or husband is at common law a competent and compellable witness.

ILLUSTRATIONS.

1. A. and others are jointly charged with conspiring fraudulently to allure B., an heiress under 21, out of the possession and against the will of her father, with intent to cause her to be married to A.; and they are tried together, after A. has married B. B. is a competent witness: *R. v. Wakefield* (1827), 1st Count, 2 Lew. C. C. at 7, 287; and Trial, pub. by Murray, at 4, 143—155, 257.

2. A., a prostitute, and others are jointly charged with conspiring fraudulently to procure B., a youth under 21 entitled to property, to marry A.; and they are tried together, after B. has married A. B. is a competent witness: submitted, but see *contra*, *R. v. Serjeant* (1826), Ry. & M. 352, and *obiter dicta* in *R. v. Lord Mayor of London* (1886), 55 L. J. M. C. 118; 54 L. T. 761; 16 Cox, C. C. 77; 50 J. P. 711.

It is believed that cases coming within the above statement form the only exception at common law to the general rule respecting the incompetency of the wife or husband of an accused person to testify, although it has been supposed that cases of high treason form another exception: Stephen's Dig. Evid., note in 3rd ed. p. 113; 4th ed. p. 121; 2 Tay. Evid. p. 894; Rose. 118. In Archbold, however,

the contrary view is expressed, *viz.*, that cases of treason form another exception, but it is conceived that this view is erroneous: see Arch. 324. § 4.

Whenever the wife or husband of a person charged with an offence is at common law a competent witness against the person so charged, such wife or husband is also a competent witness in favour of the person so charged: *R. v. Perry* (1794), *coram* Gibbs, C. J., when Recorder of Bristol, cited and approved by Abbott, C. J., in *R. v. Serjeant* (1826), Ry. & M. at 354.

As the general rule which at common law excludes the evidence of the wife or husband of the person charged extends only to a wife or husband lawfully married, upon a trial for bigamy, after the first marriage has been established, the party with whom the second marriage was contracted is a competent and compellable witness at common law either against or for the accused; for such party is of course not in law the wife or husband: see Arch. 324; Rose. 117; 2 Tay. Evid. p. 889. Such a party can also be examined on the *voir dire* to prove facts showing the invalidity of the alleged marriage: *R. v. Young* (1851), 5 Cox, C. C. 296.

5. In Scotland, in a case where a list of witnesses is required, the husband or wife of a person charged shall not be called as a witness for the defence, unless notice be given in the terms prescribed by section thirty-six of the Criminal Procedure (Scotland) Act, 1887.¹ Applica-
tion of
Act to
Scotland.

50 & 51
Vict. c. 35,
s. 36.

¹ List of witnesses required in Scotland.—This Act to simplify and amend the criminal law of Scotland and its procedure, and to alter the constitution of

§ 5. certain Courts, makes provision as to the list of witnesses and list of productions in ss. 24, 27, 35, 36, 53, and 69. These sections will be found in the Appendix, *post*, pp. 88 *et seqq.*

Provision
as to pre-
vious Acts.

6.—(1.) This Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act,¹ except that nothing in this Act shall affect the Evidence Act, 1877.²

40 & 41
Vict. c. 14.

(2.) But this Act shall not apply to proceedings in courts martial unless so applied—

29 & 30
Vict.
c. 109,
s. 65.

(a.) as to courts martial under the Naval Discipline Act, by general orders made in pursuance of section sixty-five of that Act;³ and

44 & 45
Vict. c. 58,
s. 70.

(b.) as to courts martial under the Army Act by rules made in pursuance of section seventy of that Act.⁴

¹ **Extent of application of Act.**—With the exceptions hereinafter mentioned, and subject to sub-s. (2), on and after the 12th October, 1898 (see s. 7 (2), *post*, p. 54), this Act shall apply to all criminal proceedings, including those pending when the Act comes into operation (see s. 7 (2) and note thereto, *post*, p. 54) in England and Scotland, but not in Ireland (see s. 7 (1), *post*, p. 54); and all prior enactments enabling a defendant and the wife or husband of a defendant in certain criminal proceedings to give evidence, must now be treated as overridden by the provisions of this Act. A list of such enactments—some twenty-one in number—will be found in 2 Tay. Evid. p. 885, note ⁶; *cf.* Arch. 321; Rosc. 120.

§ 6.

Penal proceedings in Ecclesiastical Courts.—Notwithstanding the declaration that “this Act shall apply to all criminal proceedings,” there seems to be some doubt whether it will apply to penal proceedings in the Ecclesiastical Courts. It was held in a criminal suit in the Court of Arches, brought against a clergyman under the Church Discipline Act—3 & 4 Vict. c. 86—that by virtue of ss. 2 and 3 of the Evidence Act, 1851—14 & 15 Vict. c. 99—the defendant was competent and compellable to give evidence: *Bishop of Norwich v. Pearse* (1868), L. R. 2 A. & E. 281; 37 L. J. Ecc. 90, Sir Robert Phillimore, overruling the decision of Dr. Lushington in *Burder v. O'Neill* (1863), 9 Jur. N. S. 1109; 2 New R. 551; 9 L. T. 232, which had been questioned in the P. C. in *Berney v. Bishop of Norwich* (1867), 36 L. J. Ecc. 10. (See ss. 2, 3, and 4 of the latter Act in Appendix, *post*, pp. 69—70; *cf.* Arch. 320.) But one of the grounds of Sir R. Phillimore’s decision was that the words in s. 3 of the Evidence Act, 1851, “‘in any criminal proceeding’ refer to proceedings in which the Crown, as guardian of the public weal, is prosecutor; and not to suits which the common law denominates ‘criminal,’ and in which the prosecutor is the Ordinary, or the promoter of his office, especially having regard to the words of the 4th section:” L. R. 2 A. & E. at 285. If the present Act should be held to apply to criminal proceedings in the Ecclesiastical Courts, the defendant in such proceedings will cease to be a compellable witness, and will no longer be forced in case of his guilt to choose between the alternatives of incriminating himself, or—what is tantamount to it—declining to answer, or committing perjury.

Smuggling cases in Courts of Revenue.—Doubts having arisen whether in cases of smuggling where proceedings at law were taken on the revenue side of the Court of Exchequer to recover penalties, the defendant was or was not a competent witness, three Acts were passed with the view of removing such doubts, but without success: see 2 Tay. Evid. p. 884.

§ 6. A fourth Act—the Crown Suits Act, 1865—after enacting that ss. 2 and 3 of the Evidence Act, 1851, and the Evidence Amendment Act, 1853, should apply to such proceedings, provides that: “any proceeding at law on the revenue side of the Court shall not for the purposes of this Act be deemed a criminal proceeding *within the meaning of the said sections and Act*, as extended and applied by the present section:” 28 & 29 Vict. c. 104, s. 34; 3 Chitty’s Stat., “Crown,” p. 51. A fifth Act—the Customs Consolidation Act, 1876—enacts that where any such proceedings are had, “the defendant shall be competent and compellable to give evidence:” 39 & 40 Vict. c. 36, s. 259. Whether the latter section has now been by implication repealed by s. 6 (1) of the present Act, which is made to “apply to all criminal proceedings,” seems to depend on whether such proceedings against smuggling are or are not “criminal proceedings” *within the meaning of the present Act*. In other words, the present section seems to raise once more doubts precisely similar to those which the five successive Acts referred to were passed to remove. The jurisdiction of the old Court of Exchequer as a court of revenue as well as a common law court is now exercised by the Queen’s Bench Division of the High Court: see the Judicature Act, 1873, ss. 16, 32, and Order of Council of 16th December, 1880, which came into force on 26th February, 1881.

² The Evidence Act, 1877.—This Act, which remains unaffected by the present Act, consists of a single section, which is as follows:—

“On the trial of any indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding, and the wife or husband of any

such defendant, shall be admissible witnesses and compellable to give evidence.” § 6.

³ **Courts Martial in Navy.**—By the Naval Discipline Act, s. 65, power is given to the Admiralty to frame General Orders for regulating the procedure and practice of Courts Martial under that Act, subject to the approval of the Queen in Council.

After the wreck or capture of a ship, where all, or all the surviving, officers and crew are tried together before one Court Martial, it is made lawful by s. 92 of the same Act “to call upon all or any of them when upon their trial to give evidence on oath or affirmation before the Court touching any of the matters then under inquiry, but no officer or seaman or other person shall be obliged to give any evidence which may tend to criminate himself.”

That section will remain in full force unless and until General Orders are made under s. 65 applying the Criminal Evidence Act, 1898, to Courts Martial under the Naval Discipline Act; if and when such General Orders are made, the above provisions of s. 92 will be superseded by the provisions of this Act.

Up to the present time (8th October, 1898) no such General Orders have been made applying this Act to Naval Courts Martial.

⁴ **Courts Martial in Army.**—By the Army Act, s. 70, power is given to the Queen to make Rules of procedure, to be signified under the hand of a Principal Secretary of State, which are to be judicially noticed.

Section 156 (1) of the same Act makes it an offence to buy, exchange, take in pawn, detain, or receive from a soldier, or to solicit or entice a soldier to sell, exchange, pawn, or give away, or to assist or act for a soldier in selling, exchanging, pawning or making away with, arms, ammunition, equipments, or regimental necessaries, clothing or provisions; and s. 156 (3) enacts that: “A person charged with an

§ 6. offence against this section, and the wife or husband of such person, may, if he or she think fit, be sworn and examined as an ordinary witness in the case."

That section will remain in full force unless and until Rules are made under s. 70 applying the Criminal Evidence Act, 1898, to Courts Martial under the Army Act; if and when such Rules are made, the above provision of s. 156 (3) will be superseded by the provisions of this Act.

Up to the present time (8th October, 1898) no such Rules have been made applying this Act to Military Courts Martial.

Extent,
com-
mence-
ment, and
short title.

7.—(1.) This Act shall not extend to Ireland.

(2.) This Act shall come into operation on the expiration of two months from the passing thereof.¹

(3.) This Act may be cited as the Criminal Evidence Act, 1898.

¹ **Commencement of Act.**—This Act, passed on the 12th August, will therefore come into operation on the 12th October, 1898.

It is supposed by some persons that under the above provision this Act will not come into operation until the 13th October. But in accordance with the maxim that the law takes no notice of the fractions of a day, an Act of Parliament is deemed to have passed on the first moment of the day on which the Royal Assent is given: *Tomlinson v. Bullock* (1879), 4 Q. B. D. 230; 48 L. J. M. C. 95; 40 L. T. 459; *cf. Migotti v. Colwill* (1879), 4 C. P. D. 233; 48 L. J. C. P. 695; 40 L. T. 747; 14 Cox, C. C. 305. Accordingly, in the case of this Act, the two months (*i.e.*, calendar months: Interpretation Act, 1889—52 & 53 Vict. c. 63—s. 3) expire on the last moment of the 11th October, and the Act comes into opera-

tion on the first moment of the 12th October (*cf. ibid.* § 7. s. 36 (2)).

The Act will apply on its commencement to all criminal proceedings, whether then pending or commenced subsequently to that date. "When a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act": *per* Wilde, B., in *Wright v. Hale* (1860), 6 H. & N. 227, at 232; 30 L. J. Ex. 40, at 43; approved by Lord Wensleydale in H. L. in *Att.-Gen. v. Sillem* (1864), 10 H. L. Ca. 704, at 763; 10 Jur. N. S. at 456. "No one has a vested right in any particular form of procedure": *per* James, L. J., in *Warner v. Murdock* (1877), 4 Ch. D. 750, at 752; 46 L. J. Ch. 121; 35 L. T. 748.

SCHEDULE.

ENACTMENTS REFERRED TO.¹

Section 4,
ante, p. 39.

Session and Chapter.	Short Title.	Enactments referred to.
5 Geo. 4, c. 83.	The Vagrancy Act, 1824.	The enactment punishing a man for neglecting to maintain or deserting his wife or any of his family. ²
8 & 9 Vict. c. 83.	The Poor Law (Scotland) Act, 1845.	Section eighty. ³
24 & 25 Vict. c. 100.	The Offences against the Person Act, 1861.	Sections forty-eight to fifty-five. ⁴
45 & 46 Vict. c. 75.	The Married Women's Property Act, 1882.	Section twelve and section sixteen. ⁵
48 & 49 Vict. c. 69.	The Criminal Law Amendment Act, 1885.	The whole Act. ⁶
57 & 58 Vict. c. 41.	The Prevention of Cruelty to Children Act, 1894.	The whole Act. ⁷

Sched. ¹ **Table of Offences.**—The gist of the offences dealt with by the enactments here referred to will be found in the Table of Offences, printed *post*, pp. 58—61, where the reader is referred to various text books setting out the enactments, and commenting upon them.

² See ss. 3, 4 and 5 of the Vagrancy Act, 1824, 12 Chitty's Statutes, "Vagrant." The Act does not apply to Scotland or Ireland: s. 22.

³ As to the offences dealt with by s. 80 of the Poor Law (Scotland) Act, 1845, see Table of Offences, *post*, p. 58.

⁴ Of these eight sections of the Offences against the Person Act, 1861, three have been repealed for many years, *viz.*, ss. 49, 50, 51. As to the offences dealt with by the remaining five sections specified (which do not extend to Scotland: s. 78), see Table of Offences, *post*, p. 58. The three repealed sections dealt with the following offences:—

S. 49. Procuring the defilement of a girl under 21.
Repealed by s. 19, and replaced by s. 2 of the Criminal Law Amendment Act, 1885: see Table of Offences, post, p. 59.

S. 50. Carnally knowing a girl under 10.
Repealed by s. 2 of Offences against the Person Act, 1875, which was itself repealed by s. 19 of the Criminal Law Amendment Act, 1885: See now s. 4 of the latter Act, and Table of Offences, post, p. 59.

S. 51. Carnally knowing a girl between 10 and 12.
Repealed by s. 2 of Offences against the Person Act, 1875, which was itself repealed by s. 19 of the Criminal Law Amendment Act, 1885: See now s. 5 of the latter Act, and Table of Offences, post, p. 59.

So much of s. 52 as deals with indecent assault on a female remains in force (see Table of Offences, *post*, p. 58); while part of s. 52, dealing with another offence, was repealed by s. 19 of the Criminal Law Amendment Act, 1885: see Rose. 283.

⁵ The Married Women's Property Act, 1882, **Sched.** applies to England and Ireland, but not to Scotland: s. 26. The effect of ss. 12 and 16 (printed in Appendix, *post*, pp. 72-73) is stated in the Table of Offences, *post*, p. 59: *cf.* Stephen's Dig. Crim. Law, 5th ed., Arts. 311, 327, pp. 248, 263; and see the observations on the Married Women's Property Act, 1882, and the Amending Act of 1884—47 Vict. c. 14 in Appendix, *post*, pp. 72-74.

⁶ The Criminal Law Amendment Act, 1885, applies to England, Ireland and Scotland: see ss. 14, 15. Its binding force has not been affected by the repeal of certain superfluous parts by the Statute Law Revision Act, 1898—61 & 62 Vict. c. 22.

The gist of the offences dealt with by the Criminal Law Amendment Act, 1885, is stated in the Table of Offences, *post*, pp. 58, 59-60.

⁷ The Prevention of Cruelty to Children Act, 1894—an Act passed since the last edition of Archbold (1893) or of Roscoe (1890)—applies to England, Ireland and Scotland: see ss. 26, 27. The offences with which it deals are declared by the two first sections, which are printed, together with other sections bearing on the subject, in Appendix, *post*, pp. 75 *et seqq.*, and the gist of those offences is stated in the Table of Offences, *post*, pp. 60-61.

TABLE OF OFFENCES UNDER SCHEDULE.

The offences under the enactments referred to in the Schedule to this Act are as follows :—

Offences.	Enactments referred to.	References to Text-Books, where Enactments are printed or referred to.
1. Neglect by a man to maintain, or desertion by him of, his wife or any of his family.	The Vagrancy Act, 1824 (5 Geo. 4, c. 83), ss. 3, 4, 5. E.	Chitty's Statutes, Vol. 12, "Vagrant."
2. Neglect by a man to maintain, or desertion by him of, his wife or child.	The Poor Law (Scotland) Act, 1845 (8 & 9 Vict. c. 83), s. 80. S.	
3. Neglect by the mother or putative father to maintain her or his illegitimate child.	<i>Ibid.</i> S.	
4. Rape	The Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 48. E. & I. As to rape by personating husband, see the Criminal Law Amendment Act, 1885, s. 4. U. K.	Arch. 809. Rosc. 847.
5. Indecent assault on a female . .	24 & 25 Vict. c. 100, s. 52. E. & I.	Arch. 809. Rosc. 849, 854.
6. Abduction of a woman entitled to property against her will from motives of lucre.	Same Act, s. 53. E. & I.	Arch. 823. Rosc. 283, 290. Arch. 801. Rosc. 249, 250, 251, 252, 255.
7. Fraudulent abduction of a girl under 21 entitled to property against the will of her father, mother, or other guardian.	<i>Ibid.</i> E. & I.	<i>Ibid.</i>
8. Forceful abduction of any woman against her will.	Same Act, s. 54. E. & I.	Arch. 802. Rosc. 250, 251, 255.
9. Abduction of a girl under 16 against the will of her father, mother, or other guardian.	Same Act, s. 55. E. & I.	Arch. 803. Rosc. 250, 251, 255.

N.B.—In the second column of the above Table, the letter **E.** means that the enactment applies to England only; **S.** to Scotland only; **E. & I.** to England and Ireland only; and **U. K.** to the United Kingdom. The present Act, however, does not extend to Ireland: s. 7 (1), *ante*, p. 54.

Offences.	Enactments referred to.	References to Text-Books, where Enactments are printed or referred to.
10. Any act done by a husband with respect to the separate property of his wife, which if done by a stranger would render the latter liable to prosecution : Provided that no criminal proceeding can be taken by a wife against her husband by virtue of this Act— (a) while they are living together, as to any property claimed by her ; nor (b) while they are living apart, as to any act done by him while they were living together concerning such property ; unless such property has been wrongfully taken by him when leaving or deserting, or about to leave or desert, her. “Property” includes a thing in action.	The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 12. E. & I. Same Act, s. 24.	Appendix, <i>post</i>, p. 72. Appendix, <i>post</i>, p. 73.
11. Any similar act done by a wife with respect to any property of her husband.	Same Act, s. 16. E. & I.	Appendix, <i>post</i>, p. 73.
12. Procuring, or attempting to procure, the defilement of a woman or girl.	The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 2. U. K.	Arch. 815. Rosc. 848, 403.
13. Procuring, or attempting to procure, the defilement of a woman or girl by intimidation, fraud, or administering drugs.	Same Act, s. 3. U. K.	Arch. 815. Rosc. 248, 253, 854.
14. Carnally knowing, or attempting to carnally know, a girl under 13.	Same Act, s. 4. U. K.	Arch. 817. Rosc. 848, 66, 108, 857.
15. Carnally knowing, or attempting to carnally know, a girl between 13 and 16.	Same Act, s. 5. U. K.	Arch. 818. Rosc. 849.

Table of Offences.

Offences.	Enactments referred to.	References to Text-Books, where Enactments are printed or referred to.
16. Carnally knowing, or attempting to carnally know, a female idiot or imbecile, knowing at the time that she was an idiot or imbecile.	The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 5. U. K.	Arch. 809. Rosc. 849, 855.
17. Owner or occupier, or person having the management or control of premises, permitting girl to be there for the purpose of being carnally known, such girl being— (1) Under 13; or (2) Between 13 and 16.	Same Act, s. 6. U. K.	Arch. 818. Rosc. 850, 858.
18. Abduction of a girl under 18 against the will of her father, mother, or other guardian.	Same Act, s. 7. U. K.	Arch. 806. Rosc. 850, 250, 253, 254, 255, 256.
19. Detaining a woman or girl against her will upon premises with intent that she shall be carnally known.	Same Act, s. 8. U. K.	Arch. 816. Rosc. 850.
20. Detaining a woman or girl against her will in any brothel.	<i>Ibid.</i> U. K.	<i>Ibid.</i>
21. Gross act of indecency by one male person with another.	Same Act, s. 11. U. K.	Arch. 832. Rosc. 851.
22. Keeping a brothel, or knowingly permitting premises to be used as a brothel. Summary proceedings.	Same Act, s. 13. U. K.	Rosc. 773, 774.
23. Offence of cruelty by a person over 16, having the custody, charge, or care of a child under 16; <i>viz.</i> , Wilfully assaulting, ill-treating, neglecting, abandoning, or exposing such child in a manner likely to cause it unnecessary suffering, or injury to its health; or causing or procuring such act or neglect.	The Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 1. U. K.	Appendix, <i>post</i> , p. 75.

Offences.	Enactments referred to.	References to Text-Books, where Enactments are printed or referred to.
24. Causing a child under the age hereinafter mentioned, or if having the custody, charge or care of such child, allowing it to be in any of certain specified places for any of the following purposes:— (a) Begging or receiving alms, or inducing the giving of alms: boy under 14, girl under 16. (b) Singing, playing, or performing for profit, or offering anything for sale, between 9 p.m. and 6 a.m.: boy under 14, girl under 16. (c) Singing, playing or performing for profit, or offering anything for sale: child under 11. (d) Being trained as an acrobat, contortionist, or circus performer, or for any dangerous performance: child under 16. Subject nevertheless to certain specified qualifications. Summary proceedings.	The Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 2. U. K.	Appendix, <i>post</i>, p. 76.

N.B.—In the second column of the above Table, the letter **E.** means that the enactment applies to England only; **S.** to Scotland only; **E. & I.** to England and Ireland only; and **U. K.** to the United Kingdom. The present Act, however, does not extend to Ireland: s. 7 (1), *ante*, p. 54.

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APPENDIX.

CRIMINAL EVIDENCE ACT, 1898.

61 & 62 VICT. c. 36.

TEXT OF ACT.

An Act to amend the Law of Evidence.

[12th August 1898.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. *Competency of witnesses in criminal cases.*]—Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person.¹ Provided as follows:—

- (a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application:
- (b) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution²:
- (c) The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged³:
- (d) Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife

- compellable to disclose any communication made to her by her husband during the marriage⁴:
- (e) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged⁵:
 - (f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—
 - (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged⁶; or
 - (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution⁷; or
 - (iii) he has given evidence against any other person charged with the same offence.⁸
 - (g) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the Court, give his evidence from the witness box or other place from which the other witnesses give their evidence:
 - (h) Nothing in this Act shall affect the provisions of section eighteen of the Indictable Offences Act, 1848,⁹ or any right of the person charged to make a statement without being sworn.¹⁰

¹ *Ante*, p. 15.⁴ *Ante*, p. 25.⁷ *Ante*, p. 30.² *Ante*, p. 17.⁵ *Ante*, p. 29.⁶ *Ante*, p. 32.³ *Ante*, p. 25.⁶ *Ante*, p. 29.⁹ 11 & 12 Vict. c. 42, s. 18; see *ante*, p. 33.¹⁰ *Ante*, p. 33.

2. Evidence of person charged.]—Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution.¹

¹ *Ante*, p. 35.

3. Right of reply.]—In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.¹

¹ *Ante*, p. 36.

4. Calling of wife or husband in certain cases.]—(1.) The wife or husband of a person charged with an offence under any enactment mentioned in the Schedule to this Act¹ may be called as a witness either for the prosecution or defence and without the consent of the person charged.²

(2.) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.³

¹ *Ante*, p. 39.

² *Ante*, p. 39.

³ *Ante*, p. 44.

5. Application of Act to Scotland.]—In Scotland, in a case where a list of witnesses is required, the husband or wife of a person charged shall not be called as a witness for the defence, unless notice be given in the terms prescribed by section thirty-six of the Criminal Procedure (Scotland) Act, 1887.¹

¹ 50 & 51 Vict. c. 35, s. 36; see *ante*, p. 49; and see this and other sections of that Act printed *post*, pp. 88 *et seqq.*

6. Provision as to previous Acts.]—(1.) This Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act,¹ except that nothing in this Act shall affect the Evidence Act, 1877.²

(2.) But this Act shall not apply to proceedings in Courts Martial unless so applied—

- (a) as to Courts Martial under the Naval Discipline Act, by General Orders made in pursuance of section sixty-five of that Act;³ and
 (b) as to Courts Martial under the Army Act by Rules made in pursuance of section seventy of that Act.⁴

¹ *Ante*, p. 50.

² 40 & 41 Vict. c. 14; see *ante*, p. 52.

³ 29 & 30 Vict. c. 109, s. 65; see *ante*, p. 53.

⁴ 44 & 45 Vict. c. 58, s. 70; see *ante*, p. 53.

7. *Extent, commencement, and short title.*]—(1.) This Act shall not extend to Ireland.

(2.) This Act shall come into operation on the expiration of two months from the passing thereof.¹

(3.) This Act may be cited as the Criminal Evidence Act, 1898.

¹ *Ante*, p. 54.

SCHEDULE.

ENACTMENTS REFERRED TO.¹

Session and Chapter.	Short Title.	Enactments referred to.
5 Geo. 4, c. 83	The Vagrancy Act, 1824.	The enactment punishing a man for neglecting to maintain or deserting his wife or any of his family. ²
8 & 9 Vict. c. 83 ..	The Poor Law (Scotland) Act, 1845.	Section eighty. ³
24 & 25 Vict. c. 100.	The Offences against the Person Act, 1861.	Sections forty-eight to fifty-five. ⁴
45 & 46 Vict. c. 75.	The Married Women's Property Act, 1882.	Section twelve and section sixteen. ⁵
48 & 49 Vict. c. 69.	The Criminal Law Amendment Act, 1885.	The whole Act. ⁶
57 & 58 Vict. c. 41.	The Prevention of Cruelty to Children Act, 1894.	The whole Act. ⁷

¹ *Ante*, p. 56. See also s. 4, and notes thereto, *ante*, pp. 39 *et seqq.*

² *Ante*, p. 56.

⁴ *Ante*, p. 56.

⁶ *Ante*, p. 57.

³ *Ante*, p. 56.

⁵ *Ante*, p. 57.

⁷ *Ante*, p. 57.

THE EVIDENCE ACT, 1851.

14 & 15 VICT. c. 99.

(*Lord Denman's Act.*)

Passed 7th August, 1851.

Came into operation 1st November, 1851 : s. 20.

2. *Parties to be admissible witnesses.*^{1]}—On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any Court of Justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable² to give evidence, either *vivâ voce* or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding.

¹ This was the first enactment which enabled *parties* to an action to give evidence. If a husband and wife were *joint parties*, they were thus enabled to give evidence; otherwise the wife or husband of either party was still precluded (until 1853: see s. 1 of Act of 1853, *post*, p. 71) from giving evidence on the ground of interest: see 2 Tay. Evid. pp. 877—9.

² “Compellable” means “compellable by process of law”: *Kops v. R.*, (1894) A. C. 650, at 653, P. C.; 6 R. 522; 70 L. T. 890; 58 J. P. 668.

3. *Nothing herein to compel person charged with criminal offence to give evidence tending to criminate himself, &c.*^{1]}—But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable² to give evidence for or against himself or herself, or shall render any

person compellable to answer any question tending to criminate himself or herself,³ [or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.⁴]

¹ This proviso does not exclude the application of s. 2 to penal proceedings in Ecclesiastical Courts: see note¹ to s. 6 of the Criminal Evidence Act, 1898, *ante*, p. 51.

² *I.e.*, "compellable by process of law": see note² to s. 2, *supra*.

³ The provision that no witness need criminate himself only declares the undoubted rule of the common law. For Judge Taylor's criticism on this declaration, see 2 Tay. Evid. 7th ed. note², on p. 1133; 9th ed. note¹, on p. 878.

⁴ The words in square brackets are now rendered ineffective by the Criminal Evidence Act, 1898, ss. 1, 4 (1), 6 (1), *ante*, pp. 13, 39, 50.

4. *Not to apply to proceedings in consequence of adultery, or to actions for breach of promise.*—[Nothing herein contained shall apply to any action, suit, proceeding, or bill in any Court of common law, or in any Ecclesiastical Court, or in either House of Parliament, instituted in consequence of adultery, or to any action for breach of promise of marriage.¹]

¹ S. 4 was repealed by s. 1 of the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68); but as to the effect of this section on the construction of ss. 2 and 3, *supra*, see *Bishop of Norwich v. Pearse* (1868), *coram* Sir R. Phillimore, L. R. 2 A. & E. 281, at 285; 37 L. J. Ecc. 90, cited *ante*, p. 51.

18. *Act not to extend to Scotland.*—This Act shall not extend to Scotland.¹

¹ See certain enactments amending the law of evidence in Scotland, printed *post*, pp. 86 *et seqq.*

THE EVIDENCE AMENDMENT ACT, 1853.

16 & 17 VICT. c. 83.

Passed 20th August, 1853.

Came into operation 11th July, 1853 : s. 6.

1. *Husbands and wives of parties to be admissible witnesses.*]—On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any Court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding.¹

¹ This was the first enactment in England which rendered the husbands and wives of the parties (unless they were themselves joint parties, as to which see note ¹ to s. 2 of the Act of 1851, *ante*, p. 69) competent witnesses in the High Courts. They had been rendered competent witnesses in the County Courts seven years before, in 1846 (9 & 10 Vict. c. 95, s. 83). They were now made "competent and compellable to give evidence" in any Court (except as mentioned in s. 2, *infra*), *i.e.*, "compellable by process of law": *Kops v. R.*, (1894) A. C. 650, at 653, P. C.; 6 R. 522; 70 L. T. 890; 58 J. P. 668.

2. *Exception in criminal cases.*]—Nothing herein shall render any husband competent or compellable¹ to give evidence for or against his wife, or any wife competent or compellable¹ to give evidence for or against her husband, in any criminal proceeding, [or in any proceeding instituted in consequence of adultery.²]

¹ As to the meaning of "compellable," see note ¹ to preceding section.

² The words in square brackets were repealed by the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 1.

3. *Husbands and wives not compelled to disclose communications.*—No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.¹

¹ See the Criminal Evidence Act, 1898, s. 1 (*d*), *ante*, p. 14; and the rule as to disclosing communications between husband and wife considered *ante*, pp. 25 *et seqq.*

MARRIED WOMEN'S PROPERTY ACT, 1882.

45 & 46 VICT. c. 75.

Passed 18th August, 1882.

Came into operation 1st January, 1883: s. 25.

12. *Remedies of married woman for protection and security of separate property.*¹—Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies² and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding:³ Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any

act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

¹ Ss. 12 and 16 of this Act are referred to in the Schedule to the Criminal Evidence Act, 1898, *ante*, p. 55; and the effect of their provisions is stated in the Table of Offences, *ante*, p. 59. Accordingly, in any criminal proceeding, when a person is charged with an offence under s. 12 or s. 16 of this Act, the wife or husband of such person may be called as a witness either for the prosecution or defence, and without the consent of the person charged.

² Sir J. F. Stephen has pointed out that to describe a criminal proceeding as a "remedy" is to use a very peculiar phrase: Stephen's Digest of Evidence, 4th ed., note ⁴ on pp. 121—122.

³ In consequence of the defective wording of this section—which after providing that "in any indictment or other proceeding" under it the property may be laid in the wife, enacts that "in any proceeding" a husband or wife shall be competent to give evidence (omitting the words "indictment or other")—and also in consequence of the defective wording of s. 16, after the decision in *R. v. Brittleton* (1884), 12 Q. B. D. 266; 53 L. J. M. C. 83; 50 L. T. 276; 15 Cox, C. C. 431—which decided that the husband was not made a competent witness against his wife upon her trial, where she was indicted jointly with her paramour for stealing his money and goods—the amending Act of 1884 (*post*, p. 74) was passed to remedy these defects. It is apprehended that the enactments in ss. 12 and 16 of the Act of 1882, so far as they relate to the competency of a wife or husband in criminal proceedings, and also s. 1 of the Act of 1884, are now overridden by s. 4(1) of the Act of 1898, *ante*, p. 39; see s. 6 (1), and note ¹ thereto, *ante*, p. 50.

16. Act of wife liable to criminal proceedings.]—A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.¹

¹ As to the competency of the husband to give evidence in a prosecution under this section, see note ³ to s. 12, *supra*, and the Act of 1884, *post*, p. 74.

24. Interpretation of terms.] . . . The word "property" in this Act includes a thing in action.

26. Extent of Act.]—This Act shall not extend to Scotland.

MARRIED WOMEN'S PROPERTY ACT, 1884.

47 VICT. c. 14.

Passed 23rd June, 1884.

Came into operation on passing.

WHEREAS by section sixteen of the Married Women's Property Act, 1882,¹ a wife is, under the circumstances therein mentioned, declared to be liable to criminal proceedings by her husband, and a doubt has arisen as to whether the husband is admissible as a witness against his wife in such criminal proceedings, while section twelve of the same Act² declares that in any proceeding under that section a husband or wife shall be competent to give evidence against each other; and it is desirable that the said doubt should be removed, and the said Act otherwise amended:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

¹ 45 & 46 Vict. c. 75, s. 16, *ante*, p. 73.

² S. 12, *ante*, p. 72.

1.¹ *Husband or wife competent witness in criminal proceedings under 45 & 46 Vict. c. 76.*—[In any such criminal proceeding against a husband or a wife as is authorised by the Married Women's Property Act, 1882,² the husband and wife respectively shall be competent and admissible witnesses, and, except when defendant, compellable to give evidence.]

¹ The Act only consists of two sections, s. 2 giving the short title. S. 1 (the defects of which are pointed out in Stephen's Digest of Evidence, 4th ed. note ⁴, on pp. 121—122) is now in effect repealed by s. 4 (1) of the Criminal Evidence Act, 1898, *ante*, p. 39.

² *Ante*, pp. 72, 73.

PREVENTION OF CRUELTY TO CHILDREN
ACT, 1894.

57 & 58 VICT. c. 41.

Passed 17th August, 1894.

Came into operation 21st August, 1894: s. 28 (3).

The whole of this Act is included in the Schedule to the Criminal Evidence Act, 1898, ante, p. 55; and see Table of Offences, ante, pp. 60-61.

Cruelty to Children.

1. *Punishment for cruelty to children.*—(1.) If any person over the age of sixteen years who has the custody, charge, or care of any child under the age of sixteen years, wilfully assaults, ill-treats, neglects, abandons, or exposes such child, or causes or procures such child to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child unnecessary suffering, or injury to its health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanor; and

- (a) on conviction on indictment, shall be liable, at the discretion of the Court, to a fine not exceeding one hundred pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding two years; and
 - (b) on summary conviction shall be liable, at the discretion of the Court, to a fine not exceeding twenty-five pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour for any term not exceeding six months.
- (2.) A person may be convicted of an offence under this section either on indictment or by a Court of summary

jurisdiction notwithstanding the death of the child in respect of whom the offence is committed.

(3.) If it is proved that a person indicted under this section was interested in any sum of money accruable or payable in the event of the death of the child, and had knowledge that such sum of money was accruing or becoming payable, the Court, in its discretion, may

(a) increase the amount of the fine under this section so that the fine does not exceed two hundred pounds; or

(b) in lieu of awarding any other penalty under this section, sentence the person indicted to penal servitude for any term not exceeding five years.

(4.) A person shall be deemed to be interested in a sum of money under this section if he has any share in or any benefit from the payment of that money, though he is not a person to whom it is legally payable.

(5.) An offence under this section is in this Act referred to as an offence of cruelty.

Restrictions on Employment of Children.

2. Restrictions on employment of children.]—If any person—

(a) causes or procures any child, being a boy under the age of fourteen years, or being a girl under the age of sixteen years, or, having the custody, charge, or care of any such child, allows that child, to be in any street, premises, or place for the purpose of begging or receiving alms, or of inducing the giving of alms, whether under the pretence of singing, playing, performing, offering anything for sale, or otherwise; or

(b) causes or procures any child, being a boy under the age of fourteen years, or being a girl under the age of sixteen years, or, having the custody, charge, or care of any such child, allows that child, to be in any street, or in any premises licensed for the sale of any intoxicating liquor, other than premises licensed according to law for public entertainments,

for the purpose of singing, playing, or performing for profit, or offering anything for sale, between nine p.m. and six a.m.; or

- (c) causes or procures any child under the age of eleven years, or, having the custody, charge, or care of any such child, allows that child, to be at any time in any street, or in any premises licensed for the sale of any intoxicating liquor, or in premises licensed according to law for public entertainments, or in any circus or other place of public amusement to which the public are admitted by payment, for the purpose of singing, playing, or performing for profit, or offering anything for sale; or
- (d) causes or procures any child under the age of sixteen years, or, having the custody, charge, or care of any such child, allows that child to be in any place for the purpose of being trained as an acrobat, contortionist, or circus performer, or of being trained for any exhibition or performance which in its nature is dangerous,

that person shall, on summary conviction, be liable, at the discretion of the Court, to a fine not exceeding twenty-five pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding three months.

Provided that—

- (i.) This section shall not apply in the case of any occasional sale or entertainment the net proceeds of which are wholly applied for the benefit of any school or to any charitable object, if such sale or entertainment is held elsewhere than in premises which are licensed for the sale of any intoxicating liquor but not licensed according to law for public entertainments, or if, in the case of a sale or entertainment held in any such premises as aforesaid, a special exemption from the provisions of this section has been granted in writing under the hands of two justices of the peace; and
- (ii.) Any local authority may, if they think it necessary or desirable so to do, from time to time by byelaw

extend or restrict the hours mentioned in paragraph (b) of this section, either on every day or on any specified day or days of the week, and either as to the whole of their district or as to any specified area therein; and

- (iii.) Paragraphs (c) and (d) of this section shall not apply in any case in respect of which a licence granted under this Act is in force, so far as that licence extends; and
- (iv.) Paragraph (d) of this section shall not apply in the case of a person who is the parent or legal guardian of a child, and himself trains the child.

3. Licences for employment of children.]—(1.) A petty sessional Court, or in Scotland the School Board, may, notwithstanding anything in this Act, grant a licence for such time and during such hours of the day, and subject to such restrictions and conditions as the Court or Board think fit, for any child exceeding seven years of age,—

- (a) to take part in any entertainment or series of entertainments to take place in premises licensed according to law for public entertainments, or in any circus or other place of public amusement as aforesaid; or
- (b) to be trained as aforesaid; or
- (c) for both purposes;

if satisfied of the fitness of the child for the purpose, and if it is shown to their satisfaction that proper provision has been made to secure the health and kind treatment of the children taking part in the entertainment or series of entertainments or being trained as aforesaid, and the Court or Board may, upon sufficient cause, vary, add to, or rescind any such licence.

Any such licence shall be sufficient protection to all persons acting under or in accordance with the same.

(2.) A Secretary of State may assign to any inspector appointed under section sixty-seven of the Factory and Workshop Act, 1878,¹ specially and in addition to any other usual duties, the duty of seeing whether the restrictions and conditions of any licence under this section are

duly complied with, and any such inspector shall have the same power to enter, inspect, and examine any place of public entertainment at which the employment of a child is for the time being licensed under this section as an inspector has to enter, inspect, and examine a factory or workshop under section sixty-eight of the same Act.

(3.) Where any person applies for a licence under this section he shall, at least seven days before making the application, give notice thereof to the chief officer of police for the district in which the licence is to take effect, and that officer may appear or instruct some person to appear before the authority hearing the application, and show cause why the licence should not be granted, and the authority to whom the application is made shall not grant the same unless they are satisfied that notice has been properly so given.

(4.) Where a licence is granted under this section to any person, that person shall, not less than ten days after the granting of the licence, cause a copy thereof to be sent to the inspector of factories and workshops acting for the district in which the licence is to take effect, and if he fails to cause such copy to be sent, shall be liable on summary conviction to a fine not exceeding five pounds.

(5.) Nothing in this or in the last preceding section shall affect the provisions of the Elementary Education Act, 1876,² or the Education (Scotland) Act, 1878.³

¹ 41 & 42 Vict. c. 16, s. 67.

² 39 & 40 Vict. c. 79.

³ 41 & 42 Vict. c. 78.

Power as to Habitual Drunkards.

11. Power as to habitual drunkards.]—Where it appears to the Court by or before which any person is convicted of the offence of cruelty within the meaning of this Act, or of any of the offences mentioned in the Schedule to this Act, that that person is a parent of the child in respect of whom the offence was committed, or is living with the parent of the child, and is an habitual drunkard within the meaning of the Inebriates Acts, 1879 and 1888,¹ the

Court, in lieu of sentencing such person to imprisonment, may, if it thinks fit, make an order for his detention for any period named in the order not exceeding twelve months in a retreat under the said Acts, the licensee of which is willing to receive him, and the said order shall have the like effect, and copies thereof shall be sent to the local authority and Secretary of State in like manner as if it were an application duly made by such person and duly attested by two justices under the said Acts; and the Court may order an officer of the Court or constable to remove such person to the retreat, and on his reception the said Acts shall have effect as if he had been admitted in pursuance of an application so made and attested as aforesaid; Provided that—

- (a) an order for the detention of a person in a retreat shall not be made under this section unless that person, having had such notice as the Court deems sufficient of the intention to allege habitual drunkenness, consents to the order being made; and,
- (b) if the wife or husband of such person, being present at the hearing of the charge, objects to the order being made, the Court shall, before making the order, take into consideration any representation made to it by the wife or husband; and
- (c) before making the order the Court shall, to such extent as it may deem reasonably sufficient, be satisfied that provision will be made for defraying the expenses of such person during detention in a retreat.

¹ 42 & 43 Vict. c. 19; and 51 & 52 Vict. c. 19.

Evidence and Procedure.

12. Evidence of accused person.—[In any proceeding against any person for an offence under this Act or for any of the offences mentioned in the Schedule to this Act, such person shall be competent but not compellable to give evidence, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness

in the case, and shall be competent but not compellable to give evidence.¹]

¹ It is conceived that this section is repealed by implication by the Criminal Evidence Act, 1898, s. 6 (1), *ante*, p. 50. See note ¹ to that section, *ibid*.

13. *Extension of power to take deposition of child.*]—(1.) Where a justice is satisfied by the evidence of a registered medical practitioner that the attendance before a Court of any child, in respect of whom an offence of cruelty within the meaning of this Act or any of the offences mentioned in the Schedule to this Act is alleged to have been committed, would involve serious danger to its life or health, the justice may take in writing the deposition of such child on oath, and shall thereupon subscribe the same and add thereto a statement of his reason for taking the same, and of the day when and place where the same was taken, and of the names of the persons (if any) present at the taking thereof.

(2.) The justice taking any such deposition shall transmit the same with his statement—

- (a) if the deposition relates to an offence for which any accused person is already committed for trial, to the proper officer of the Court for trial at which the accused person has been committed; and
- (b) in any other case to the clerk of the peace of the county or borough in which the deposition has been taken;

and the clerk of the peace to whom any such deposition is transmitted shall preserve, file, and record the same.

14. *Admission of deposition of child in evidence.*]—Where on the trial of any person on indictment for any offence of cruelty within the meaning of this Act or any of the offences mentioned in the Schedule to this Act, the Court is satisfied by the evidence of a registered medical practitioner that the attendance before the Court of any child in respect of whom the offence is alleged to have been committed would involve serious danger to its life or health, any deposition of the child taken under the Indictable

Offences Act, 1848,¹ or the Indictable Offences (Ireland) Act, 1849,² or the Petty Sessions (Ireland) Act, 1851,³ or this Act, shall be admissible in evidence either for or against the accused person without further proof thereof—

- (a) if it purports to be signed by the justice by or before whom it purports to be taken ; and
- (b) if it is proved that reasonable notice of the intention to take the deposition has been served upon the person against whom it is proposed to use the same as evidence, and that that person or his counsel or solicitor had, or might have had if he had chosen to be present, an opportunity of cross-examining the child making the deposition.

¹ 11 & 12 Vict. c. 42 ; see s. 17 ; Rosc. 64.

² 12 & 13 Vict. c. 69.

³ 14 & 15 Vict. c. 93.

15. Evidence of child of tender years.]—(1.) Where, in any proceeding against any person for an offence under this Act or for any of the offences mentioned in the Schedule to this Act, the child in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not in the opinion of the Court understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the Court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth : and the evidence of such child, though not given on oath but otherwise taken and reduced into writing, in accordance with the provisions of section seventeen of the Indictable Offences Act, 1848,¹ or of section fourteen of the Petty Sessions (Ireland) Act, 1851,² or of section thirteen of this Act, shall be deemed to be a deposition within the meaning of those sections respectively :

Provided that—

- (a) A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution

is corroborated by some other material evidence in support thereof implicating the accused ; and

- (b) Any child whose evidence is received as aforesaid and who shall wilfully give false evidence shall be liable to be indicted and tried for such offence, and on conviction thereof may be adjudged such punishment as is provided for by section eleven of the Summary Jurisdiction Act, 1879,¹ in the case of juvenile offenders, or in Ireland by section four of the Summary Jurisdiction over Children (Ireland) Act, 1884,² in the case of children.

(2.) This section shall not apply to Scotland.

¹ 11 & 12 Vict. c. 42, s. 17 ; see Rosc. 64.

² 14 & 15 Vict. c. 93, s. 14.

³ 42 & 43 Vict. c. 49, s. 11.

⁴ 47 & 48 Vict. c. 19, s. 4.

16. *Power to proceed with case in absence of child.*—Where in any proceedings with relation to an offence of cruelty within the meaning of this Act, or any of the offences mentioned in the Schedule to this Act, the Court is satisfied by the evidence of a registered medical practitioner that the attendance before the Court of any child in respect of whom the offence is alleged to have been committed would involve serious danger to its life or health, and is further satisfied that the evidence of the child is not essential to the just hearing of the case, the case may be proceeded with and determined in the absence of the child.

17. *Presumption of age of child.*—Where a person is charged with an offence under this Act, or any of the offences mentioned in the Schedule to this Act, in respect of a child who is alleged in the charge or indictment to be under any specified age, and the child appears to the Court to be under that age, such child shall for the purposes of this Act be deemed to be under that age, unless the contrary is proved.

Supplemental.

23. *Provision as to parents and as to meaning of "custody, charge, or care."*—(1.) The provisions of this Act relating

to the parent of a child shall apply to the step-parent of the child and to any person cohabiting with the parent of the child, and the expression "parent" when used in relation to a child includes guardian and every person who is by law liable to maintain the child.

(2.) This Act shall apply in the case of a parent who being without means to maintain a child fails to provide for its maintenance under the Acts relating to the relief of the poor, in like manner as if the parent had otherwise neglected the child.

(3.) For the purposes of this Act—

Any person who is the parent of a child shall be presumed to have the custody of the child; and

Any person to whose charge a child is committed by its parent shall be presumed to have charge of the child; and

Any other person having actual possession or control of a child shall be presumed to have the care of the child.

24. Right of parent, &c. to administer punishment.]—Nothing in this Act shall be construed to take away or affect the right of any parent, teacher, or other person having the lawful control or charge of a child to administer punishment to such child.

25. General definitions.]—In this Act unless the context otherwise requires—

The expression "local authority" means, as regards any borough in England, the council of the borough; as regards the city of London, the common council; as regards the county of London, the county council; and as regards any other place in England, the district council, and until a district council is established the urban or rural sanitary authority:

The expression "chief officer of police" means—

in the city of London and the liberties thereof, the commissioner of city police;

in the metropolitan police district, the commissioner of police of the metropolis;

elsewhere in England, the chief constable, or head

constable or other officer, by whatever name called, having the chief local command of the police in the police district in reference to which such expression occurs :

The expression "street" includes any highway or other public place, whether a thoroughfare or not :

The expression "place of safety" includes any place certified by the local authority under this Act for the purposes of this Act, and also includes any workhouse or police station, or any hospital surgery, or place of the like kind :

The expression "Industrial Schools Acts" means as regards England and Scotland the Industrial Schools Act, 1866,¹ and the Acts amending the same.

¹ 29 & 30 Vict. c. 118.

26. (*Contains special provisions as to the application of the Act to Scotland.*)

27. (*Contains special provisions as to the application of the Act to Ireland.*)

SCHEDULE.

Any offence under sections twenty-seven,¹ fifty-five,² or fifty-six³ of the Offences against the Person Act, 1861, and any offence against a child under the age of sixteen years under sections forty-three or fifty-two⁴ of that Act.

Any offence under the Children's Dangerous Performances Act, 1879.⁵

Any other offence involving bodily injury to a child under the age of sixteen years.

¹ 24 & 25 Vict. c. 100, s. 27 : see Arch. 792 ; Rosc. 377.

² *Ibid.* s. 55 : cf. Table of Offences, *ante*, p. 58 ; and see Arch. 803 ; Rosc. 250.

³ *Ibid.* s. 56 : see Arch. 807 ; Rosc. 251.

⁴ *Ibid.* s. 52 : see Arch. 823 ; Rosc. 283—4.

⁵ 42 & 43 Vict. c. 34 : see ss. 3 and 4 ; Arch. 793—4.

SCOTLAND.



16 VICT. c. 20.



Passed 9th May, 1853.

Came into operation on passing.



3. *As to examination of witnesses, whether named in the record or not.*]—It shall be competent to adduce and examine as a witness in any action or proceeding in Scotland any party to such action or proceeding, or the husband or wife of any party, whether he or she shall be individually named in the record or proceeding or not; but nothing herein contained shall render any person, or the husband or wife of any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, his wife or her husband, excepting in so far as the same may be at present competent by the law and practice of Scotland, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any proceeding render any husband competent or compellable to give against his wife evidence of any matter communicated by her to him during the marriage, or any wife competent or compellable to give against her husband evidence of any matter communicated by him to her during the marriage.

4. [*Enactment that the Act should not apply to cases of adultery, divorce, breach of promise, &c., repealed by sect. 1 of the Act of 1874 (37 & 38 Vict. c. 64).*]

5. *Adducing of party as a witness not to have effect of reference to his oath.*]—The adducing of any party as a witness in any cause or proceeding by the adverse party

shall not have the effect of a reference to the oath of the party so adduced:¹ Provided always, that it shall not be competent to any party who has called and examined the opposite party as a witness thereafter to refer the cause or any part of it to his oath, and that in all other respects the right of reference to oath shall remain as at present established by the law and practice of Scotland.

¹ As to when a reference to oath may be had, see *Longworth v. Yelverton* (1867), L. R. 1 H. L. Sc. 218; 4 Macq. 746; 10 Jur. N. S. 1209; 11 L. T. 118.

THE EVIDENCE FURTHER AMENDMENT (SCOTLAND) ACT, 1874.

37 & 38 VICT. c. 64.

Passed 7th August, 1874.

Came into operation on passing.

2. *Parties and their husbands and wives to be witnesses in proceedings on account of adultery.*—The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding; provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.

3. *Law as to proof of promise of marriage in declarator of marriage founded thereon, cum copula subsequente, not to be altered.*—Nothing in this Act contained shall be construed to alter or affect the law of Scotland in force at and prior to the passing of this Act relating to the proof of a promise of marriage in any action of declarator of marriage founded upon promise of marriage, cum copula subsequente.

CRIMINAL PROCEDURE (SCOTLAND) ACT, 1887.

50 & 51 VICT. c. 35.

Passed 16th September, 1887.Came into operation 15th October, 1887: s. 77.

24. *Service.*.]—Service of indictment, list of witnesses and list of productions appended thereto, and all notices or intimations to persons accused, and all citations of witnesses, whether for precognition or trial, may be made or given by any macer, messenger at arms, sheriff officer, or officer of police at any place, and where any person accused is in prison at the time of service on him, such service shall be made by any governor, deputy governor, or warder of the prison in which such person is confined.

27. *Record copy indictment and list of witnesses.*.]—The record copy of the indictment and any extract convictions that are to be produced shall on or before the date of service of the indictment be lodged with the sheriff clerk of the district in which the Court of the first diet is situated, and a copy of the list of witnesses and a copy of the list of productions shall be lodged with the sheriff clerk of the district in which the Court of the second diet is situated, and where a person accused is indicted for fugitation, the lists shall be lodged in the Justiciary Office.

35. *Description of witnesses.*.]—The list of witnesses shall consist of the names of the witnesses, with their addresses added, and it shall not be necessary to insert the words “now or lately residing at,” or any similar words, and it shall not be an objection to the admissibility of any witness that he has ceased to reside at the address given before the date of the trial, provided that he resided at such address at some time, not being more than six months previous to the date of the trial, and it shall not be necessary to insert in the list of witnesses the names of any witnesses to the declaration of an accused person or the names of any

witnesses to prove that an extract conviction applies to an accused person, but witnesses may be examined in regard to these matters without previous notice.

36. *Written notice of special defence.*—It shall not be competent for the person accused to state any special defence unless a plea of special defence shall be tendered and recorded at the first diet, or unless cause be shown to the satisfaction of the Court for a special defence not having been lodged till a later day, which must in any case not be less than two clear days before the second diet, and it shall not be competent for the person accused to examine any witnesses or to put in evidence any productions not included in the lists lodged by the prosecutor, unless written notice of the names and designations of such witnesses and of such productions shall have been given to the Procurator Fiscal of the district of the second diet when the case is to be tried in the Sheriff Court, or to the Crown Agent where the case is to be tried in the High Court of Justiciary, at least three clear days before the day on which the jury is sworn to try the case against him, or unless the accused person shall show before a jury is sworn to try the case against him that he was unable to give the full notice of three days in regard to any witnesses he may desire to examine or productions he may desire to make, and where this is shown the Court shall give such remedy to the prosecutor by adjournment or postponement of the trial or otherwise as shall seem just, and a copy of every written notice hereby required shall be lodged by the person accused with the sheriff clerk of the district in which the second diet is to be held, or in any case the second diet of which is to be held in the High Court of Justiciary in Edinburgh with the clerk of Justiciary, at or before the second diet, for the use of the Court.¹

¹ In a case where a list of witnesses is required, the husband or wife of a person charged with an offence shall not be called as a witness for the defence unless notice be given in the terms prescribed by this section: s. 5 of the Criminal Evidence Act, 1898, *ante*, p. 49.

53. *Objections to witnesses.*.]—Any objection in respect of misnomer or misdescription of any person named in the indictment, or of any witness in the list of witnesses, must be stated before a jury has been sworn to try the case against a person accused, and no such objection shall be admitted as ground for postponing any trial or for excluding any witness, unless the accused person shall, at least four clear days before the second diet, give notice to the Procurator Fiscal of the district of the second diet where notice of trial is given for the Sheriff Court, or to the Crown agent where notice of trial is given for the High Court of Justiciary, of his inability to discover who such person named in the indictment is, or to find such witness, and shall show that notwithstanding such intimation to the prosecutor he has not been furnished with such additional information as might enable him to ascertain who such person is, or to find such witness in sufficient time to pre-cognosce him before the trial, and where either of these things shall be shown the Court shall give such remedy by postponement, adjournment, or otherwise, as shall seem just.

67. *Proving and recording previous convictions.*.]—Previous convictions against a person accused shall not be laid before the jury, nor shall reference be made thereto in presence of the jury before the verdict is returned; but nothing herein contained shall prevent the public prosecutor from laying before the jury evidence of such previous convictions where, by the existing law, it is competent to lead evidence of such previous convictions as evidence in causa in support of the substantive charge, or where the person accused shall lead evidence to prove previous good character, and it shall no longer be necessary for the jury to return a verdict finding whether previous convictions against the person accused have been proved or not, but where any such conviction is admitted in evidence by the Court, either after a plea of guilty or after a verdict of guilty to any charge to which such previous conviction constitutes an aggravation, the Court shall have power to take such previous conviction into consideration in awarding punish-

ment, and where any person is convicted of any crime, and also of any aggravation by previous conviction, the clerk of the Court in which sentence is pronounced, shall enter in the record of the trial a statement of the contents of any extract conviction that is put in evidence, setting forth the date, the place of trial, the Court, the nature of the crime, the aggravations accompanying it, if any, and the sentence pronounced; and where such person is again accused of any offence, in regard to which such conviction may be competently used as an aggravation, a duly certified extract of the conviction setting forth the particulars of previous conviction as above, shall be admissible and sufficient as evidence to prove against him all the previous convictions and aggravations therein set forth.¹

¹ See now the Criminal Evidence Act, 1898, s. 1 (*f*), *ante*, pp. 14-15, and notes ⁶, ⁷, and ⁸ thereto, *ante*, pp. 29-33.

69. Declarations.]—The declaration of the person accused, the formal parts of which may be written or printed, or partly written and partly printed, duly authenticated by the magistrate examiner as having been emitted before him according to the existing law and practice, shall be received in evidence without being sworn to by witnesses, and it shall not be necessary to insert the names of any witnesses to the declaration in any list of witnesses, either for the prosecution or for the person accused, but it shall be competent for the person accused, before such declaration is read to the jury, to adduce as witnesses the persons who were present when the declaration was emitted, and to examine them upon any matters regarding such declaration on which it would be competent to examine them according to the existing law and practice, and to move the Court to refuse to allow the declaration to be read on grounds appearing on the face of the declaration itself, or on the ground of what is disclosed in such evidence or on both of these grounds, and where a person accused objects to the declaration, the prosecutor shall be entitled to examine any witnesses in regard thereto, whom the person accused may be entitled to examine as aforesaid.

74. *Repeal.*—All statutes, laws, regulations, and usages inconsistent or at variance with the provisions of this Act shall be, and the same are hereby repealed: Provided always, that the same shall continue in force in all other respects whatsoever.

75. *Act not to apply to treason.*—Nothing in this Act contained shall apply to the crimes of treason or rebellion against the sovereign, or shall affect the procedure in any prosecution or trial for treason, or for rebellion against the sovereign, but all procedure in the prosecution and trial of such crimes shall be conducted according to the existing law and practice.

CANADA.



THE CANADA EVIDENCE ACT, 1893.

56 VICT. c. 31.

Passed 1st April, 1893.

Came into operation 1st July, 1893: s. 29.

2. *Application of Act.*]—This Act shall apply to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf.

4. *Competency of accused and of wife and husband.*]—Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness, whether the person so charged is charged solely or jointly with any other person.

Proviso as to communications during marriage.]—Provided, however, that no husband shall be competent to disclose any communication made to him by his wife during their marriage, and no wife shall be competent to disclose any communication made to her by her husband during their marriage.

(2.) The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the Judge, or by counsel for the prosecution in addressing the jury.¹

¹ See *ante*, p. 18.

5. *Incriminating answers.*]—No person shall be excused from answering any question upon the ground that the

answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any other person : Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence.

6. *Evidence of mute.*]—A witness who is unable to speak, may give his evidence in any other manner in which he can make it intelligible.

NEW SOUTH WALES.



THE CRIMINAL LAW AMENDMENT ACT OF 1883.

46 VICT. No. 17.

Passed 26th April, 1883.

Came into operation 1st July, 1883: s. 1.

470. *Conduct of defence at trial.*—Every accused person on his trial may, if so advised by counsel, make any admissions as to matters of fact, whatever the crime charged, or give any consent which might lawfully be given in a civil case—and, whether defended by counsel or not, he may make any statement at the close of the case for the prosecution and before calling any witness in his defence without being liable to examination thereupon by counsel for the Crown, or by the Court—and may thereafter personally or by his counsel address the jury.

THE CRIMINAL LAW AND EVIDENCE
AMENDMENT ACT OF 1891.

55 VICT. No. 5.

Passed 14th December, 1891.
Came into operation on passing.

6. *Accused and husband or wife competent witnesses.*—Every person charged with an indictable offence, and the husband or wife, as the case may be, of the person so charged, shall be competent, but not compellable,¹ to give evidence in every Court on the hearing of such charge. Provided that the person so charged shall not be liable to be called as a witness on behalf of the prosecution, nor to be questioned on cross-examination without the leave of the Judge as to his or her previous character or antecedents.²

¹ As to the effect of the words "competent, but not compellable," see *R. v. Kops* (1893), 14 New South Wales Law Reports, 150; and S. C. on appeal to the P. C., *Kops v. R.*, (1894) A. C. 650; 6 R. 522; 70 L. T. 890; 58 J. P. 668; and the observations *ante*, pp. 18—25.

² The interpretation put upon this enactment by the Supreme Court of New South Wales is that it is not necessary to obtain the express leave of the Judge to cross-examine a defendant as to character. Where the Judge did not stop such cross-examination by the prosecution, he was held to have given implied leave: *R. v. Nelson* (1893), 10 New South Wales Weekly Notes, 44.

It has been held that this section does not take away the right of the accused person to make an unsworn statement under s. 470 of the Act of 1883 (*ante*, p. 95); and that he may first make such statement, and afterwards give evidence on his own behalf: *R. v. Smith* (1896), 17 New South Wales Law Reports, 104.

NEW ZEALAND.

[The Justices of the Peace Act, 1882 (No. 15), was the first statute in New Zealand which rendered a person charged with an offence and the wife or husband of such person competent, but not compellable, to give evidence: s. 80. The enactment, which was limited to certain summary proceedings, was repealed by s. 75 of the Indictable Offences Summary Jurisdiction Act, 1894 (No. 47).

The Criminal Evidence Act, 1889 (No. 16), amended and extended the provisions to all criminal proceedings. Part of that Act was repealed by s. 422 and Third Schedule, Part II., of the Criminal Code Act, 1893 (57 Vict. No. 56); and the remainder by s. 75 of the Indictable Offences Summary Jurisdiction Act, 1894 (58 Vict. No. 47). The sections of the later Acts, which with some variations reproduce the provisions of the Act of 1889 concerning such testimony, are printed below.]

THE CRIMINAL CODE ACT, 1893.

57 VICT. No. 56.

Passed 6th October, 1893.

Came into operation on a day appointed by the Governor's Proclamation (not to be earlier than three months after gazetting of Proclamation): s. 3 (1).

Provisions relating to Procedure apply to all prosecutions commenced on or after that day: s. 3 (2); and see further s. 3 (3).

398. *Evidence of accused.*—(1.) Every one proceeded against by indictment for any offence, either solely or with others, shall be a competent but not compellable witness for himself or herself upon his or her trial for such offence, and the wife or husband, as the case may be, of every such accused person shall be a competent witness for him or her upon such trial.

(2.) Provided that the wife or husband of an accused

person shall not be called as a witness without the consent of such accused person, except in any case in which such wife or husband are compellable to give evidence, or the charge be one in which either husband or wife is charged with inciting or being accessory to an offence against the other.

(3.) Provided that no such person shall be liable to be called as a witness by the prosecutor, but every such witness called and giving evidence on behalf of the accused shall be liable to be cross-examined like any other witness on any matter though not arising out of his examination-in-chief.

(4.) Provided that, so far as the cross-examination relates to any previous conviction of the accused, or to the credit of the accused, the Court may limit such cross-examination to such extent as it thinks proper, although the proposed cross-examination might be permissible in the case of any other witness.

399. *Evidence of accused when undefended.*—If an accused person, or any one of several accused persons being tried together, is not defended by counsel, then, on the completion of the examination of the witnesses on the part of the prosecution, the following caution, or words to the like effect, shall be addressed to him by or under the direction of the Court: that is to say, “Having heard the evidence against you, do you wish to be called as a witness and give evidence in answer to the charge? You are not obliged to give evidence, and if you decide not to be examined the fact will not be allowed to be subject of comment; but, if you are called, the evidence you give may be used against you.”

400. *No adverse comment allowed.*—If a person charged with an offence shall refrain from giving evidence, or from calling his wife or her husband, as the case may be, as a witness, no comment adverse to the person charged shall be allowed to be made thereon.¹

¹ See *ante*, p. 18.

401. *Summing up.*—(1.) If an accused person, or any one of several accused persons being tried together, is

defended by counsel, such counsel shall at the end of the case for the prosecution declare whether he intends to adduce evidence or not on behalf of the accused person for whom he appears, and, if no counsel for any such accused person thereupon announces his intention to adduce evidence, the counsel for the prosecution may address the jury by way of summing up.

(2.) Upon every trial of any person for any crime, whether the accused person is defended by counsel or not, he shall be allowed, if he thinks fit, to open his case, and after the conclusion of such opening the accused person or his counsel shall be entitled to examine such witnesses as he thinks fit, and, when all the evidence is concluded, to sum up the evidence. In case evidence for the defence is adduced, the counsel for the prosecution shall have the right to reply.

403. *Admissions.*]—Any accused person on his trial for any crime, or his counsel or solicitor, may admit any fact alleged against the accused so as to dispense with proof thereof.

THE INDICTABLE OFFENCES SUMMARY JURISDICTION ACT, 1894.

58 VICT. No. 47.

Passed 24th October, 1894.

Came into operation on passing.

8. *Evidence of accused.*]—(1.) Everyone charged before Justices with any crime punishable on indictment, and everyone proceeded against summarily for any offence, either solely or with others, shall be a competent but not compellable witness for himself or herself for such offence, and the wife or husband, as the case may be, of every such accused person shall be a competent witness for him or her: Provided,—

(2.) The wife or husband of an accused person shall not

be called as a witness without the consent of such accused person, except in any case in which such wife or husband is compellable to give evidence, or the charge be one in which either husband or wife is charged with being a party to an offence against the other :

(3.) No such person shall be liable to be called as a witness by the prosecutor, but every such witness called and giving evidence on behalf of the accused shall be liable to be cross-examined like any other witness on any matter though not arising out of his examination-in-chief :

(4.) So far as the cross-examination relates to any previous conviction of the accused, or to the credit of the accused, the Justices may limit such cross-examination to such extent as they think proper, although the proposed cross-examination might be permissible in the case of any other witness.

Evidence of accused when undefended..]—If an accused person, or any one of several accused persons being tried together, is not defended by counsel, then, on the completion of the examination of the witnesses on the part of the prosecution, the following caution, or words to the like effect, shall be addressed to him by or under the direction of the Justices : that is to say, “Having heard the evidence against you, do you wish to be called as a witness and give evidence in answer to the charge ? You are not obliged to give evidence, and if you decide not to be examined the fact will not be allowed to be subject of comment ; but, if you are called, the evidence you give may be used against you.”

No adverse comment allowed..]—If a person charged with an offence shall refrain from giving evidence, or from calling his wife or her husband, as the case may be, as a witness, no comment adverse to the person charged shall be allowed to be made thereon.¹

¹ See *ante*, p. 18.

QUEENSLAND.



THE CRIMINAL LAW AMENDMENT ACT, 1892.

56 VICT. No. 3.

Passed 21st July, 1892.
Came into operation on passing.

3. *Competency of accused person and wife or husband.*—Every person accused of an indictable offence, and the wife or husband, as the case may be, of every such accused person, shall be a competent witness on his or her behalf, but shall not be compellable to be a witness without his or her consent.

Any accused person tendering himself or herself as a witness shall be liable to cross-examination as in other cases.

Nothing in this section shall render any person compellable to answer any question tending to criminate himself or herself with respect to any matter other than the offence for which he or she is being tried, and on the trial of which he or she tenders himself or herself as a witness.

SOUTH AUSTRALIA.



45 & 46 VICT. No. 245.

Passed 30th August, 1882.
Came into operation on passing.

*An Act to enable Persons accused of Offences to give
Evidence on Oath.*

Preamble.]—Whereas it is expedient to enable persons accused of offences to give evidence on oath. Be it therefore enacted by the Governor of the Province of South Australia, with the advice and consent of the Legislative Council and House of Assembly of the said province, in this present Parliament assembled, as follows :

1. *Accused persons may give evidence on oath.*]—Notwithstanding any law or ordinance to the contrary, from and after the passing of this Act any person accused of any felony, misdemeanor, or other indictable offence, or of any offence punishable on summary conviction, shall, if such person so desires, be competent and entitled to be sworn and give evidence as a witness on the trial of the felony, misdemeanor, or offence with which he is charged, and also in like manner may give evidence on any preliminary investigation into the said felony, misdemeanor, or offence, before Justices prior to the said trial : Provided that no presumption of guilt shall be made from the fact of such person electing not to give evidence.¹

¹ See *ante*, p. 18.

2. *Evidence to be taken, and may be used against accused person.*]—Should such person give evidence on any preliminary investigation, the evidence so given shall be taken down in writing, and signed by the person giving the same, and also by the Justice or Justices, and shall be forwarded

to the Attorney-General, together with the depositions of the witnesses, and afterwards upon the trial of any accused person, the same may be given in evidence against him without further proof, unless it shall be proved that the Justice or Justices purporting to sign the same did not in fact sign the same.

3. Interpretation.—The word “person,” whenever used in this Act, shall mean as well the person charged as the husband or wife of such person.

4. Right of reply.—The Crown shall not be entitled to the right of reply by reason only of such person having given evidence.¹

¹ See *ante*, p. 36.

5. Persons giving evidence may be cross-examined.—Any person so giving evidence shall be liable to be cross-examined as in the case of any other witness, and shall not be excused from answering any question on the ground that the answer may tend to criminate himself, and shall be liable to be prosecuted and punished for any perjury committed in such evidence in the same way as any other person now or heretofore competent to be examined as a witness: Provided always, any husband or wife of any accused person so giving evidence as aforesaid shall be excused from answering any question on the ground that the answer may tend to criminate himself or herself, as the case may be.

THE EVIDENCE FURTHER AMENDMENT ACT, 1888.

51 & 52 VICT. No. 435.

Passed 8th December, 1888.
Came into operation on passing.

2. Restriction of cross-examination.—In any action, suit, or other proceeding in any Court of Justice, whether civil or criminal, the Judge, Commissioner, Stipendiary or Special Magistrate, or Justice of the Peace presiding in such Court, may disallow any questions put in cross-examination of

any party or other witness which may appear to him to be vexatious and not relevant to any matter proper to be inquired into in the cause, matter, or proceeding then before such Court.

3. Questions relevant to credibility.]—In deciding whether questions affecting the credibility of a witness are relevant, or ought to be allowed, the Court shall have regard to the following considerations :—

- (a) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies :
- (b) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies :
- (c) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence.

4. Appeal.]—There shall be an appeal from the disallowance by any Justice or Justices of the Peace of any question put in cross-examination as aforesaid ; which appeal shall be to the nearest Local Court of Full Jurisdiction, or, at the option of the appellant, to the Local Court of Adelaide of Full Jurisdiction, and the proceedings on such appeal shall be conducted in manner, &c. . . .

VICTORIA.



THE CRIMES ACT, 1891.

55 VICT. No. 1231.

Passed 23rd December, 1891.
Came into operation on passing.

34. *Person charged with offence and wife or husband to be competent as witness.*—Where in any Court, or before any Judge or Justice, a person is presented, indicted, informed against, or charged with an indictable offence or an offence punishable on summary conviction, whether solely or with others, such person and his wife or her husband (as the case may be) may be called as a witness at any stage of the proceedings at which witnesses may be called. Provided as follows:—

- (1) The person presented, indicted, informed against, or charged shall not be called as a witness without his consent :
- (2) The wife or husband of the person presented, indicted, informed against, or charged shall not be called as a witness without the consent of that person except in any case in which such wife or husband might have been compelled to give evidence before the commencement of this Act :
- (3) A person called as a witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, either on examination, cross-examination or re-examination, any question not relevant to the particular offence with which he is

charged, unless such person has given evidence of good character. Provided always that no comment shall be made upon the fact that any such person has not given evidence in his own behalf.¹

¹ See *ante*, p. 18.

35. *Caution to be given to person charged.*—Where a person charged with an offence is not defended by counsel or solicitor, the following caution or words to the like effect shall, before he is called as a witness, be handed to him in writing under the direction of the Court, Judge, or Justice before whom he is charged (that is to say):—
“Having heard the evidence against you, do you wish to be called as a witness and give evidence in answer to the charge? You are not obliged to be called and give evidence unless you wish, but if you are called the evidence you give may be used against you, and you will be liable to be cross-examined.”

INDIA.



THE CODE OF CRIMINAL PROCEDURE, 1882.

ACT No. X. OF 1882.

Passed 6th March, 1882.

Came into operation 1st January, 1883 : s. 1.

342. *Power to examine the accused.*—For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence.

The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them ; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

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